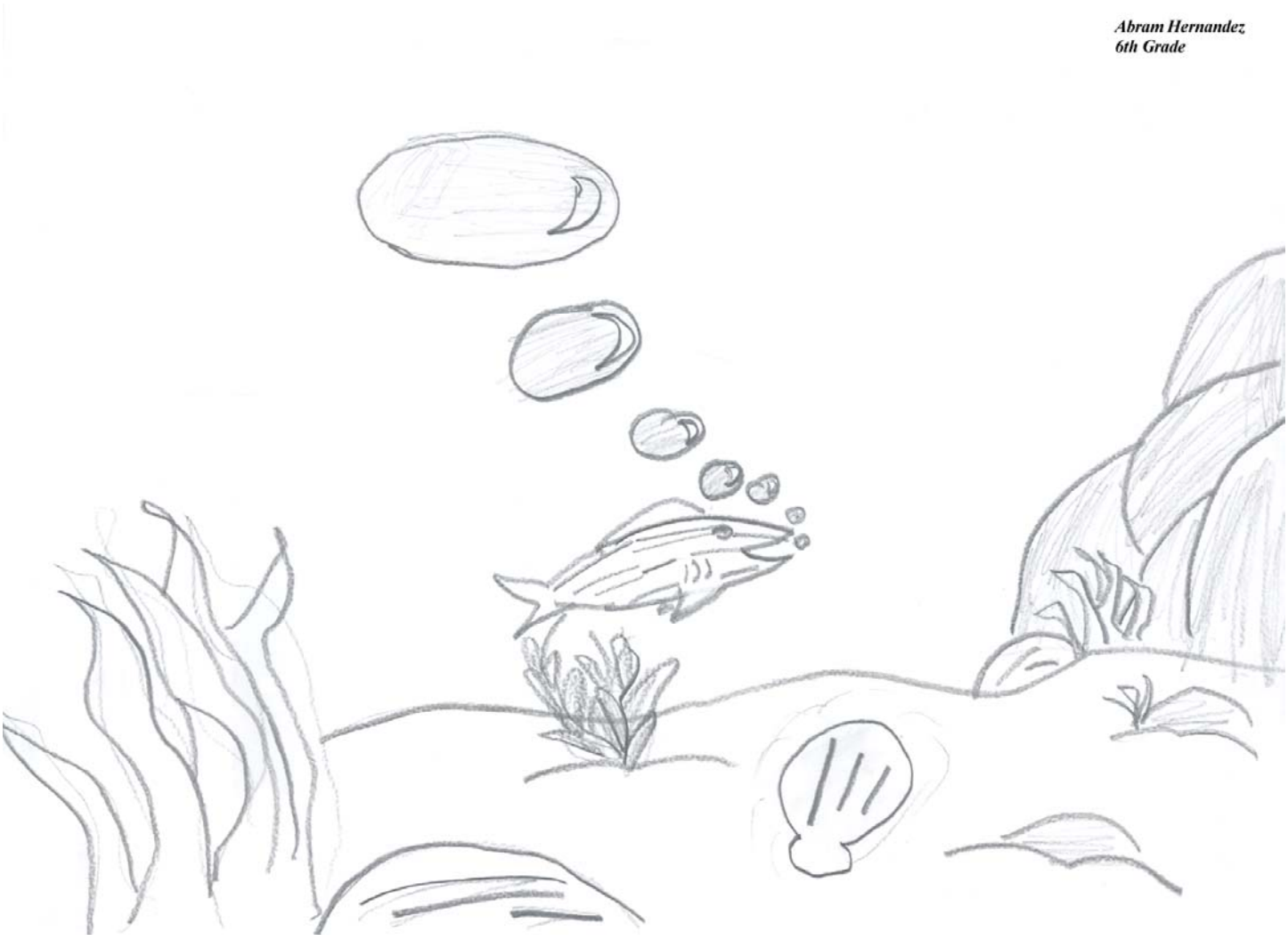
TEXAS REGISTER

Volume 36 Number 8 *February 25, 2011* *Pages 1195 – 1398*



Abram Hernandez
6th Grade

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Texas Register, **(ISSN 0362-4781, USPS 120-090),** is published weekly (52 times per year) for $211.00 ($311.00 for first class mail delivery) by LexisNexis Matthew Bender & Co., Inc., 1275 Broadway, Albany, N.Y. 12204-2694.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Albany, N.Y. and at additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** 136 Carlin Rd., Conklin, N.Y. 13748-1531.

a section of the
Office of the Secretary of State
P.O. Box 12887
Austin, TX 78711-3824
(512) 463-5561
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Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for January 26, 2011

Designating Timothy Timmerman as presiding officer of the Lower Colorado River Authority for a term at the pleasure of the Governor. Mr. Timmerman is replacing Rebecca Klein of San Antonio as presiding officer.

Designating Stephanie E. Simmons as presiding officer of the Risk Management Board for a term at the pleasure of the Governor. Ms. Simmons is replacing Ernest C. Garcia of Austin as presiding officer.

Appointments for February 7, 2011

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2012, Michael Halligan of Georgetown (Mr. Halligan is being reappointed).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2013, Lori Henning Crutchfield of Austin (pursuant to the U.S. Rehabilitation Act).

Appointed to the Rehabilitation Council of Texas for a term to expire October 29, 2013, Mark Gerald Schroeder of Wichita Falls (pursuant to the U.S. Rehabilitation Act).

Appointed to the Texas Violent Gang Task Force for a term at the pleasure of the Governor, Rodney R. Rodriguez of Lubbock (replacing Victor Bond of Bayou Vista who resigned).

Appointed to the Texas State Council for Interstate Adult Offender Supervision for a term to expire February 1, 2017, Rissie Owens of Huntsville (Ms. Owens is being reappointed).

Rick Perry, Governor

TRD-201100634

♦ ♦ ♦

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034).

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.15

The Railroad Commission of Texas adopts, on an emergency basis, amendments to §3.15, relating to Surface Equipment Removal Requirements and Inactive Wells. The emergency rule is effective immediately upon filing with the Secretary of State and will be in effect for 120 days. The emergency amendments are to amend the wording in current subsection (l)(3) and the addition of new subsection (q).

In support of the emergency adoption of amended §3.15(l)(3), the Commission makes the following findings:

1. On January 26, 2011, the Texas Oil and Gas Association, Texas Independent Producers and Royalty Owners Association, Texas Alliance of Energy Producers, Panhandle Producers and Royalty Owners Association, Permian Basin Petroleum Association and Historic Texas Ranches filed a joint petition for rulemaking and emergency rulemaking. The Petition contends that an emergency exists regarding the requirement of Railroad Commission Rule §3.15(l)(3) that hydraulic pressure tests be performed on inactive wells that are more than 25 years old and that have been inactive for more than 10 years.

2. The Railroad Commission, after notice and comment as required by law, adopted §3.15(l), effective September 13, 2010. This rule subsection generally requires that wells that are more than 25 years old and that become inactive either be fluid level tested annually or hydraulic pressure tested every five years to assure that the wells do not pose a threat to surface or subsurface waters.

3. Either a successful fluid level test or a successful hydraulic pressure test (also known as a mechanical integrity test or "MIT") demonstrates that an inactive well is not an immediate threat to water resources. However, the MIT is the more definitive, long-term assurance and, as a result is only required every five years while fluid tests must be conducted annually.

4. A successful fluid level test does not necessarily establish that a well could not be a conduit for fluids into usable quality zones. It does demonstrate, however, that as of the time of the test, any fluids in the well are sufficiently separated from usable quality zones that the well poses no immediate threat to usable quality water.

5. A successful hydrostatic MIT test affirmatively demonstrates that a wellbore retains its mechanical integrity and cannot serve as a conduit for downhole fluids into usable quality water zones.

6. All other factors being equal, the older a well is and the longer a well has been inactive, the more likely the well is to suffer a mechanical failure or otherwise become a potential threat to ground or surface water. Accordingly, existing subsection (l)(3), effective September 13, 2010, requires that wells that are both more than 25 years old and that have been inactive for more than 10 years be MIT tested once every five years without the alternative of performing annual fluid level tests.

7. Texas Natural Resources Code §89.023(a)(2), effective September 1, 2010, mandates that an inactive well may not be granted a plugging extension unless it is in compliance with all Commission rules, including, the requirement of §3.15(l)(3) that 25 year old, 10-year inactive wells be successfully MIT tested.

8. Texas Natural Resources Code §89.022(c), effective September 1, 2010, prohibits the Commission from renewing the P-5 organization report of an operator that has not obtained a plugging extension for each of its inactive wells.

9. An approved P-5 organization report is a prerequisite for an operator to lawfully operate oil and gas wells in the State of Texas. Operator P-5s must be renewed annually and roughly an equal number are due for renewal on the first day of each month of the year.

10. Unlike a fluid level test, the MIT testing of many wells requires the services of a workover rig.

11. There is a shortage of sufficient workover rigs for all operators to conduct required MITs on their 10 year inactive wells prior to their respective P-5 renewal dates.

12. Without an approved or renewed P-5, an operator would be required to cease oil and gas operations in Texas. Even the temporary, unnecessary cessation of operations by multiple oil and gas producers, given the current unstable world oil supply, would represent and imminent peril to the public safety and welfare.

13. An emergency rule authorizing demonstration of water protection by either fluid level test or MIT on a temporary basis would give operators the opportunity to conduct necessary tests to assure water protection with available resources, without interrupting production activities.

14. It is the intent of the Commission that this emergency rule, §3.15(l)(3), be effective for a period of 120 days, from February 8, 2011, the date of adoption and filing with the Office of the Secretary of State, through June 7, 2011.

In support of the emergency adoption of new subsection (q), the Commission makes the following findings:

1. On January 26, 2011, the Texas Oil and Gas Association, Texas Independent Producers and Royalty Owners Association, Texas Alliance of Energy Producers, Panhandle Producers and Royalty Owners Association, Permian Basin Petroleum Association and Historic Texas Ranches filed a joint petition for rulemak-

ing and emergency rulemaking. The Petition contends that an emergency exists regarding the implementation of HB 2259 and requests that the Railroad Commission engage in emergency and regular rulemaking to authorize operators to continue operating beyond their P-5 renewal dates without a Commission determination that compliance with HB 2259 has been achieved.

2. The Railroad Commission, after notice and comment as required by law, adopted 16 Texas Administrative Code §3.15, effective September 13, 2010. This rule generally implements new statutory requirements concerning inactive land wells enacted by the 81st Legislative Session in House Bill (HB) 2259. That bill requires an operator to obtain plugging extensions for all inactive wells it does not plug and to de-energize and cleanup inactive well sites. The statute provides seven alternative avenues for obtaining plugging extensions. Clean-up requirements under the statute begin with a well that has been inactive for one year and increase at the five and ten year inactive milestones.

3. The majority of HB 2259 has been codified in Chapter 89 of the Texas Natural Resources Code and prohibits the Railroad Commission from approving or renewing the P-5 Organization Report of an operator that does not obtain a plugging extension for each of its inactive wells and certify that it has met the inactive well site cleanup requirements.

4. The HB 2259 provision regarding P-5 renewal states, "The commission may not renew or approve the organization report required by §91.142 for an operator that fails to comply with the requirements of this subchapter." Texas Natural Resources Code §89.022(c). There is no provision in the statute for extensions to allow compliance after the P-5 renewal date.

5. A temporary emergency situation exists as a result of the new stricter requirements regarding management of inactive wells and the failure of some operators with significant numbers of inactive wells to begin bringing those wells into compliance sufficiently in advance of their P-5 renewal dates. Whether that failure to begin addressing inactive wells early was due to ignorance of the new law or inadequate planning, at this point, a shortage of trained personnel and equipment make rapid compliance with the provisions of HB 2259 impossible for some operators with significant numbers of inactive wells.

6. Texas Natural Resources Code §89.022(c), effective September 1, 2010, prohibits the Commission from renewing the P-5 organization report of an operator that has not complied with the provisions of HB 2259 obtained a plugging extension for each of its inactive wells.

7. An approved P-5 organization report is a prerequisite for an operator to lawfully operate oil and gas wells in the State of Texas. Operator P-5s must be renewed annually and roughly an equal number are due for renewal on the first day of each month of the year.

8. Without an approved or renewed P-5, an operator would be required to cease oil and gas operations in Texas. Even the temporary, unnecessary cessation of operations by multiple oil and gas producers, given the current unstable world oil supply, would represent and imminent peril to the public safety and welfare.

9. An emergency rule temporarily authorizing a 90 day extension following an operator's P-5 renewal date to allow an operator to achieve and demonstrate compliance, with the option of obtaining an additional 45-day extension for good cause, would fulfill the purposes of HB 2259, without interrupting production activities.

10. It is the intent of the Commission that this emergency subsection (q) be effective for a period of 120 days, from February 8, 2011, the date of adoption and filing with the Office of the Secretary of State, through June 7, 2011.

The Commission adopts the amendments to §3.15 on an emergency basis pursuant to Texas Government Code, §2001.034, which authorizes a state agency to adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice, and states in writing the reasons for its findings; Texas Government Code, §2001.036, which provides that if a state agency finds that an expedited effective date is necessary because of imminent peril to the public health, safety, or welfare, and subject to applicable constitutional or statutory provisions, a rule is effective immediately on filing with the secretary of state; Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 89, Subchapter B-1, as enacted by HB 2259, relating to Plugging of Certain Inactive Wells; and Texas Natural Resources Code, §91.101, which gives the Railroad Commission authority to adopt rules and orders governing the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the commission.

Cross reference to statute: Texas Government Code, Chapter 2001, and Texas Natural Resources Code, Chapters 81, 89, and 91.

Cross reference to sections affected: Texas Government Code, §2001.034 and §2001.036, and Texas Natural Resources Code, §§81.051, 81.052, 89.022, 89.023, and 91.101.

Issued in Austin, Texas, on February 8, 2011.

§3.15. Surface Equipment Removal Requirements and Inactive Wells.

(a) - (k) (No change.)

(l) Fluid level or hydraulic pressure test for inactive wells more than 25 years old.

(1) - (2) (No change.)

(3) For each inactive well that is more than 25 years old and that has been inactive more than 10 years, the operator must perform either a fluid level test once every 12 months or [~~have performed~~] a hydraulic pressure test once every five years and obtain [~~and obtained~~] the approval of the Commission or its delegate of the results of said tests [~~once every five years~~].

(4) - (7) (No change.)

(m) - (p) (No change.)

(q) Extension and appeal. If after administrative review of a refiled annual organization report, the Commission's delegate determines administratively that the organization report does not qualify for renewal because of a failure to comply with the requirements of this section concerning inactive wells, the Commission or its delegate will notify the organization of the administrative determination, provide the organization with a written statement of the reasons why the organization report does not qualify under the requirements of this section for renewal, and advise the organization that it has a 90-day time period to resolve satisfactorily the deficiencies under this section. The Commission or its delegate may grant one 45-day extension of this time period for good cause. If, after that time period, the Commission's del-

egate determines administratively that the annual organization report still does not qualify for renewal under the terms of this section, the operator may request a hearing regarding that administrative determination as provided in subsection (g) of this section. The organization's prior organization report shall remain in effect during the administrative review process and during any resulting hearing until an order of the Commission that the refiled annual organization report does not qualify for renewal has become final and appealable.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100505
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: February 8, 2011
Expiration date: June 7, 2011
For further information, please call: (512) 475-1295

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 10. DEPARTMENT OF INFORMATION RESOURCES

CHAPTER 204. INTERAGENCY CONTRACTS FOR INFORMATION RESOURCES TECHNOLOGIES

The Texas Department of Information Resources (department) proposes to amend Subchapter B, State Agency Interagency Contracts, and Subchapter C, Institution of Higher Education Interagency Contracts, of 1 TAC Chapter 204, concerning Interagency Contracts for Information Resources Technologies. The changes to the rules apply to state agencies and institutions of higher education. The assessment of the impact of the proposed change on institutions of higher education has been prepared in consultation with the Information Technology Council for Higher Education in compliance with §2054.121(b), Texas Government Code.

The proposed amendments to §§204.10 - 204.12 and §§204.30 - 204.32 result from a rule review of Chapter 204 notice which was published in the November 12, 2010, issue of the *Texas Register* (35 TexReg 10061).

The department proposes to amend §204.11(1) and §204.31(2) to increase the threshold by which a state agency or institution of higher education may procure information resources technologies from another state agency or institution of higher education without first giving public notice of a request for proposals or an invitation for bids from $50,000 to $100,000. Increasing this minimum amount is consistent with the provisions of §2054.008, Texas Government Code, which requires state agencies and institutions of higher education to notify the Legislative Budget Board of all contracts for major information systems that exceed $100,000.

The department also proposes clarifications and changes to update references to the applicable procurement rules for state agencies and institutions of higher education relating to public solicitation requirements associated with information resources technologies interagency contracts, and exceptions from those public solicitation requirements.

All references to the Texas Building and Procurement Commission in §§204.10, 204.11, 204.30, and 204.31 are removed. The enactment of House Bill 3560, 80th Legislature, 2007, transferred procurement duties and powers of the Texas Building and Procurement Commission related to the purchasing procedures relative to Chapter 204 to the Office of the Comptroller of Public Accounts. The department proposes to change its rules to refer to applicable State of Texas procurement rules rather than to reference the procurement rules of a specific state agency. The proposed change obviates the need to modify the rules again if procurement functions are transferred again between state agencies.

To comply with the provisions of §51.928(b), Texas Education Code, regarding Written Contracts or Agreements Between Certain Institutions, the department is recommending the addition of new language in §204.31(1) that exempts eligible institutions of higher education with a common governing board from the requirements of Chapter 771, Texas Government Code.

To be more responsive to agencies or institutions of higher education seeking waivers, the department proposes to amend §204.12(c) and §204.32(c) to shorten the period of time in which the department must issue a written notice of approval or denial from 30 days to 15 days following the date of a waiver request made by an agency or institution of higher education.

The department also proposes to delete an erroneous statement in §204.12(d) that states the rules are proposed under §§2054.121 and 2054.052(a), Texas Government Code.

R. Douglas Holt, Deputy Executive Director, Statewide Technology Services, has determined that increasing the minimum amount by which interagency contracts are excepted from the requirements of 1 TAC Chapter 204 will have a positive fiscal impact on state agencies and institutions of higher education for a period of five years. An exact cost avoidance estimate cannot be assessed. Assuming the time required to issue a public solicitation and make a determination of the most cost-effective alternative on average is approximately 160 hours at a rate of $31.25 (Purchaser VI, midpoint), and that approximately 50 additional contracts range between $50,000 and $100,000, then the amount of cost avoidance incurred annually would total $247,500, and a five year cost avoidance would total $1,237,500. There are no costs for agencies and institutions of higher education to implement these administrative changes.

Mr. Holt has also determined that for each year of the first five years the proposed rules are in effect, the anticipated public benefit results from a more effective use of public and financial resources through the enforcement and administration of rules concerning interagency contracts.

There are no anticipated economic costs to persons or small businesses required to comply with the proposed rules.

Comments on the proposed rule changes may be submitted to Martin Zelinsky, Interim General Counsel, 300 West 15th Street, Suite 1300, Austin, Texas 78701, or to martin.zelinsky@dir.texas.gov. Comments will be accepted for 30 days after publication in the *Texas Register.*

SUBCHAPTER B. STATE AGENCY INTERAGENCY CONTRACTS

1 TAC §§204.10 - 204.12

The amendments are proposed pursuant to §2054.119(d), Texas Government Code, which authorizes the department to define circumstances in which certain interagency contracts costing less than a minimum amount are excepted from the requirements of §2054.119, Texas Government Code, and §2054.052(a), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2054, Texas Government Code.

Sections 2054.052, 2054.119 and 2054.121, Texas Government Code, and §51.928, Texas Education Code are affected by this proposal.

§204.10. Public Solicitation Required.

Public solicitation is required under the following conditions:

(1) Except as otherwise provided in 1 T.A.C. §204.11, each state agency that proposes to receive information resources technologies under a contract from another state agency or institution of higher education must first solicit bids or proposals for the procurement of such technologies by giving public notice of a request for proposals or a request for bids.

(2) Each state agency that solicits bids or proposals from the public for the procurement of information resources technologies must do so in accordance with applicable State of Texas procurement rules [~~adopted by the Texas Building and Procurement Commission~~] pertaining to competitive bidding or competitive sealed proposals.

(3) If a state agency receives a bid or a proposal from a private vendor in response to a solicitation issued in accordance with this subsection, it must review the bid or proposal and compare it with the best proposed interagency contract available to the state agency for such information resources technologies. Specifically, the state agency must determine whether the bid or proposal:

(A) is for the same or substantially the same technologies as those available under the proposed interagency contract;

(B) would allow the state agency to accomplish the application or project at an acceptable level of quality;

(C) would allow the state agency to accomplish the application or project in an acceptable period of time; and

(D) would have a total cost to the state that is less than the total cost to the state of the best proposed interagency contract available to the state agency.

(4) If a state agency receives a bid or proposal from a private vendor that satisfies all of the criteria listed under paragraph (3) of this subsection, it may not enter into an interagency contract for the receipt of such information resources technologies.

§204.11. Exceptions to Public Solicitation Requirement.

A state agency may procure information resources technologies from another state agency or institution of higher education without first giving public notice of a request for proposals or an invitation for bids in the following cases:

(1) the total dollar amount of the proposed interagency contract does not exceed $100,000 [~~$50,000~~];

(2) the state agency has requested and received a waiver from the department in accordance with 1 T.A.C. §204.12, and the total dollar amount of the proposed interagency contract does not exceed the amount specified by the department in the waiver; or

(3) the total dollar amount of the proposed interagency contract does not exceed $1 million and one or more of the following circumstances are present:

(A) the primary purpose of the proposed interagency contract is the direct accomplishment of a specific legislative mandate;

(B) the procurement constitutes an emergency purchase under applicable State of Texas procurement rules;

[~~(B) the same or substantially the same information resources technologies are available from two or more private vendors under the catalogue purchasing procedure of the Texas Building and Procurement Commission at a cost that exceeds the cost of the proposed interagency contract;~~]

(C) the procurement constitutes a proprietary purchase under applicable State of Texas procurement rules; or [~~an emergency purchase under applicable rules of the Texas Building and Procurement Commission;~~]

[~~(D) the procurement constitutes a proprietary purchase under applicable rules of the Texas Building and Procurement Commission; or~~]

(D) [~~(E)~~] both parties to the proposed interagency contract are health and human service agencies, as that term is defined in Texas Government Code, §531.001(4).

§204.12. Waivers.

(a) A state agency, other than an institution of higher education, may submit a written request to the department for a waiver of the public solicitation requirement described in subsection (a) of this section. The written request must include the following:

(1) a description of the proposed interagency contract, including the total dollar amount of the contract;

(2) a description of the circumstances that would, in the opinion of the requesting state agency, justify an exception to the public solicitation requirement;

(3) a certification that a procurement under the proposed interagency contract would, in the opinion of the requesting state agency, be more cost effective than a procurement based on a public solicitation of bids or proposals;

(4) detailed cost information to support the certification of cost effectiveness; and

(5) any other information requested by the department.

(b) Upon receipt of a request for a waiver, the department shall promptly review the request to determine whether it contains the required information and the required certification of cost effectiveness. If the request does contain such information and certification, the department shall issue a written determination that a procurement under the proposed contract is presumed by the department to be more cost effective than a procurement based on a public solicitation of bids or proposals, and shall issue a written waiver of the public solicitation requirement for the proposed contract. The written waiver shall specify the maximum dollar amount that may be expended in connection with the proposed contract without having to comply with the public solicitation requirement.

(c) If the department has not issued a written denial of the waiver request within 15 [~~30~~] calendar days following the date of its receipt of the request, the request for a waiver is deemed approved in

an amount equal to the total dollar amount of the proposed interagency contract.

(d) A decision by the department regarding the issuance of a waiver or a determination of cost effectiveness is final and may not be appealed. [~~The rules are proposed under §§2054.121 and 2054.052(a), Texas Government Code.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100600
Martin Zelinsky
Interim General Counsel
Department of Information Resources
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 475-4700

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SUBCHAPTER C. INSTITUTION OF HIGHER EDUCATION INTERAGENCY CONTRACTS

1 TAC §§204.30 - 204.32

The amendments are proposed pursuant to §2054.119(d), Texas Government Code, which authorizes the department to define circumstances in which certain interagency contracts costing less than a minimum amount are excepted from the requirements of §2054.119, Texas Government Code, and §2054.052(a), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2054, Texas Government Code.

Sections 2054.052, 2054.119 and 2054.121, Texas Government Code, and §51.928, Texas Education Code are affected by this proposal.

§204.30. Public Solicitation Required.

Public solicitation is required under the following conditions:

(1) Except as otherwise provided in 1 T.A.C. §204.31, each institution of higher education that proposes to receive information resources technologies under a contract from another state agency or institution of higher education must first solicit bids or proposals for the procurement of such technologies by giving public notice of a request for proposals or a request for bids.

(2) Each institution of higher education that solicits bids or proposals from the public for the procurement of information resources technologies must do so in accordance with applicable State of Texas procurement rules [~~adopted by the Texas Building and Procurement Commission~~] pertaining to competitive bidding or competitive sealed proposals.

(3) If an institution of higher education receives a bid or a proposal from a private vendor in response to a solicitation issued in accordance with this subsection, it must review the bid or proposal and compare it with the best proposed interagency contract available to the institution of higher education for such information resources technologies. Specifically, the institution of higher education must determine whether the bid or proposal:

(A) is for the same or substantially the same technologies as those available under the proposed interagency contract;

(B) would allow the institution of higher education to accomplish the application or project at an acceptable level of quality;

(C) would allow the institution of higher education to accomplish the application or project in an acceptable period of time; and

(D) would have a total cost to the state that is less than the total cost to the state of the best proposed interagency contract available to the institution of higher education.

(4) If an [~~a~~] institution of higher education receives a bid or proposal from a private vendor that satisfies all of the criteria listed under paragraph (3) of this subsection, it may not enter into an interagency contract for the receipt of such information resources technologies.

§204.31. Exceptions to Public Solicitation Requirement.

An institution of higher education may procure information resources technologies from another state agency or institution of higher education without first giving public notice of a request for proposals or an invitation for bids in the following cases:

(1) both parties are institutions of higher education with a common governing board that are not subject to the requirements of Chapter 771, Texas Government Code pursuant to §51.928, Texas Education Code;

(2) [~~(1)~~] the total dollar amount of the proposed interagency contract does not exceed $100,000 [~~$50,000~~];

(3) [~~(2)~~] the institution of higher education has requested and received a waiver from the department in accordance with 1 T.A.C. §204.32, and the total dollar amount of the proposed interagency contract does not exceed the amount specified by the department in the waiver; or

(4) [~~(3)~~] the total dollar amount of the proposed interagency contract does not exceed $1 million and one or more of the following circumstances are present:

(A) the primary purpose of the proposed interagency contract is the direct accomplishment of a specific legislative mandate;

(B) the procurement constitutes an emergency purchase under applicable State of Texas procurement rules; or

[~~(B) the same or substantially the same information resources technologies are available from two or more private vendors under the catalogue purchasing procedure of the Texas Building and Procurement Commission at a cost that exceeds the cost of the proposed interagency contract;~~]

(C) the procurement constitutes a proprietary purchase under applicable State of Texas procurement rules. [~~an emergency purchase under applicable rules of the Texas Building and Procurement Commission;~~]

[~~(D) the procurement constitutes a proprietary purchase under applicable rules of the Texas Building and Procurement Commission; or~~]

[~~(E) both parties to the proposed interagency contract are institutions of higher education with a common governing board, as those terms are defined in the Education Code, §61.003.~~]

§204.32. Waivers.

(a) An institution of higher education may submit a written request to the department for a waiver of the public solicitation requirement described in subsection (a) of this section. The written request must include the following:

(1) a description of the proposed interagency contract, including the total dollar amount of the contract;

(2) a description of the circumstances that would, in the opinion of the requesting institution of higher education, justify an exception to the public solicitation requirement;

(3) a certification that a procurement under the proposed interagency contract would, in the opinion of the requesting institution of higher education, be more cost effective than a procurement based on a public solicitation of bids or proposals;

(4) detailed cost information to support the certification of cost effectiveness; and

(5) any other information requested by the department.

(b) Upon receipt of a request for a waiver, the department shall promptly review the request to determine whether it contains the required information and the required certification of cost effectiveness. If the request does contain such information and certification, the department shall issue a written determination that a procurement under the proposed contract is presumed by the department to be more cost effective than a procurement based on a public solicitation of bids or proposals, and shall issue a written waiver of the public solicitation requirement for the proposed contract. The written waiver shall specify the maximum dollar amount that may be expended in connection with the proposed contract without having to comply with the public solicitation requirement.

(c) If the department has not issued a written denial of the waiver request within 15 [~~30~~] calendar days following the date of its receipt of the request, the request for a waiver is deemed approved in an amount equal to the total dollar amount of the proposed interagency contract.

(d) A decision by the department regarding the issuance of a waiver or a determination of cost effectiveness is final and may not be appealed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100601
Martin Zelinsky
Interim General Counsel
Department of Information Resources
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 475-4700

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TITLE 10. COMMUNITY DEVELOPMENT

PART 6. TEXAS DEPARTMENT OF RURAL AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM

SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

10 TAC §255.5

The Texas Department of Rural Affairs (TDRA) proposes an amendment to §255.5, concerning the Disaster Relief Fund. The amendment proposes to set a funding priority for the Disaster Relief Fund. On February 3, 2011, the TDRA Board of Directors approved the publication of this rule proposal for comment.

Charles (Charlie) S. Stone, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment as proposed.

Mr. Stone also has determined that for each year of the first five years the proposed amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be the equitable allocation of CDBG non-entitlement area funds to eligible units of general local government in Texas. There will be no effect on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Mark Wyatt, Director, Community Development, Texas Department of Rural Affairs, P.O. Box 12877, Austin, Texas 78711, telephone: (512) 936-6701. Comments must be received no later than 30 days from the date of publication of the proposed amendment in the *Texas Register.*

The amendment is proposed under the Texas Government Code §487.052, which provides the Texas Department of Rural Affairs with the authority to adopt rules and administrative procedures to carry out the provisions of Chapter 487 of the Texas Government Code.

No other code, article, or statute is affected by the proposed amendment.

§255.5. Disaster Relief Fund.

(a) - (c) (No change.)

(d) Funding priority. The Texas CDBG program prioritizes the use of the Disaster Relief Fund for projects in which there are federal declarations that provide the federally required 25 percent match portion of the Federal Emergency Management Agency (FEMA) or Natural Resources Conservation Service (NRCS) approved budget covering approved repair and restoration activities. Priority is based on the date of the presidential declaration. For presidential declarations, Disaster Relief Funds are only used to assist eligible applicants in meeting the match requirements for FEMA Public Assistance categories A and C through G and NRCS Emergency Watershed Protection Program requiring a match for eligible costs associated with repairs and restoration of disaster-related infrastructure activities. The funding priority is the match requirements associated with FEMA Public Assistance categories A and C through G for repair or restoration rather than mitigation. Equal priority is given for the match requirements for projects in categories A and C through G addressing imminent threats to public safety. Federal hazard mitigation projects would be a lower funding priority and are not eligible under the provisions listed in this subsection. Applications must be submitted no later than 12 months from the presidential declaration. However, the Disaster Relief Fund will not necessarily retain the priority for the entire 12-month period. Disaster Relief Funds can only be used for repairs and restoration of damaged items in presidential declarations to pre-disaster conditions in design, function, and capacity.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100584
Charles S. (Charlie) Stone
Executive Director
Texas Department of Rural Affairs
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 936-7887

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SUBCHAPTER C. DISASTER RECOVERY PROGRAM

10 TAC §255.100

The Texas Department of Rural Affairs (TDRA) proposes new §255.100, concerning Compliance Agreement Requirements. The proposed new rule establishes requirements and procedures for recipients of Community Development Block Grant Disaster Recovery funds related to Hurricanes Dolly and Ike. The new rule adds definitions; reporting and data collection requirements; guidelines for assessing and prioritizing the needs of survivors of Hurricanes Dolly and Ike with disabilities; and establishing a process for progressive sanctions for a recipient's non-compliance with required contract performance.

Charles S. (Charlie) Stone, Executive Director, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new section as proposed.

Mr. Stone has also determined that for each year of the first five years the proposed new section is in effect the public benefit anticipated as a result of enforcing the new section will be compliance with the requirements of the Conciliation Agreement approved by the U.S. Department of Housing and Urban Development effective May 25, 2010. There will be no cost to small business or individuals.

Comments on the proposal may be submitted to Anne Osburn, General Counsel, TDRA, P.O. Box 12877, Austin, TX 78711, telephone: (512) 936-6342. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register.*

The new section is proposed under Texas Government Code §487.052, which provides the board with the authority to adopt rules concerning the implementation of TDRA's responsibilities.

No other code, article, or statute is affected by the proposed new section.

§255.100. Compliance Agreement Requirements.

(a) Purpose. The purpose of this section is to establish the procedures related to the administration of Hurricane Recovery Funds in compliance with the Conciliation Agreement that resolved fair housing complaints (HUD Case No. 06-10-0410-8 and 06-10-0410-9) against the State of Texas before the United States Department of Housing and Urban Development.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) CDBG--Community Development Block Grant.

(2) Conciliation Agreement--The agreement between the State of Texas, by and through the Texas Department of Rural Affairs and the Texas Department of Housing and Community Affair, and Texas Appleseed and Texas Low Income Housing Information Service, as approved by the Assistant Secretary for Fair Housing and Equal Opportunity on behalf of the United States Department of Housing and Urban Development effective May 25, 2010.

(3) HUD--United States Department of Housing and Urban Development.

(4) Hurricane Recovery Funds--Any Round I funds that are reallocated during the term of the Conciliation Agreement and Round II funds.

(5) LMI--Persons of low or moderate income as defined by HUD for purposes of Hurricane Recovery Funds.

(6) Reallocated--The redistribution of Round I Hurricane Recovery Funds beyond the initial Recipient and outside of the jurisdiction of the council of governments in which the Recipient is located.

(7) Recipient--Any entity that receives or administers any Hurricane Recovery Funds from TDRA.

(8) Round I--Hurricane Block Grant Funds made available to the State under its Action Plan for CDBG Disaster Recovery Funds pursuant to notice in the *Federal Register* published by HUD on February 13, 2009.

(9) Round II--Hurricane Block Grant Funds allocated to the State pursuant to notice in the Federal Register published by HUD on August 14, 2009.

(10) TDRA--Texas Department of Rural Affairs.

(11) The Hurricanes--Hurricanes Dolly and Ike.

(c) Process and Procedures.

(1) Data Collection and Reporting. Recipients of Hurricane Recovery Funds are required to comply with obligations to affirmatively further fair housing and with civil rights certifications. As part of this process, Recipient collects and reports to TDRA quarterly, data that includes but is not limited to the following:

(A) For non-housing activities directly linked to an individual beneficiary:

(i) the beneficiary household's income;

(ii) the beneficiary household's income as a percentage of median family income as defined by HUD;

(iii) the race and ethnicity of the beneficiaries using census or survey data.

(B) For each non-housing activity identified as principally benefitting low- and moderate-income persons: a detailed description of the methodology and other documented information used for the determination of the LMI benefit including, but not limited to:

(i) surveys;

(ii) survey tabulations;

(iii) correspondence;

(iv) sampling methodology; and

(v) other material documentation.

(2) Assessment of the needs of persons with disabilities. For non-housing activities directly linked to individual beneficiaries, Recipient assesses:

(A) the needs of survivors of the Hurricanes with disabilities; and

(B) the highest funding priority to programs serving LMI households within the population that includes those survivors identified with disabilities.

(d) Sanctions for non-compliance.

(1) TDRA imposes progressive sanctions against a Recipient for noncompliance with the applicable terms of the Conciliation Agreement or with federal law or regulation governing the administration of Hurricane Recovery Funds.

(2) A sanction imposed under paragraph (1) of this subsection against a non-compliant Recipient may include the following:

(A) Delay of a payment;

(B) Withholding of a funding award;

(C) Suspension of the non-compliant Recipient's contract;

(D) Suspension from participation in a Texas CDBG program; and

(E) Termination of the non-compliant Recipient's contract.

(3) A sanction is imposed under paragraph (1) of this subsection in accordance with the following procedure:

(A) Recipient is provided written notice of non-compliance including the basis for the assertion of a non-compliant act(s) or omission(s) and is provided fifteen days to respond in writing to the notice.

(i) After review of the Recipient's response, TDRA either confirms or rescinds the notice of non-compliance.

(ii) TDRA's determination is final and not subject to appeal.

(B) Recipient is provided thirty days to cure the non-compliant act or omission, or to take appropriate steps to cure the non-compliance.

(i) TDRA may in its sole discretion hold a funding award, delay a payment or suspend the contract of the non-compliant Recipient until compliance is achieved.

(ii) TDRA's determination is final and not subject to appeal.

(C) If after having an opportunity to cure, or take steps to cure, the non-compliant Recipient has failed to do so, TDRA may, in its sole discretion, extend the period for compliance to be achieved for an additional thirty days.

(D) Continued non-compliance results in the imposition of appropriate sanctions up to and including termination of the non-compliant Recipient's contract.

(i) The TDRA Executive Director informs the non-compliant Recipient in writing of the sanction imposed.

(ii) In accordance with Texas Government Code §487.351(d), the Executive Director's decision may be appealed to the TDRA Board.

(4) Performance that is delayed or prevented by a force majeure event, that is, an event beyond the control of the Recipient, is not considered non-compliance for purposes of imposing sanctions under this section.

(A) Upon occurrence of a force majeure event, Recipient, as promptly as possible, provides to TDRA notice of the facts and circumstances related to the event.

(B) Recipient works in good faith to resume performance as soon as the force majeure event no longer impairs or affects the ability to do so.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100573
Charles S. (Charlie) Stone
Executive Director
Texas Department of Rural Affairs
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 936-6726

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1011

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Education Agency or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Education Agency proposes the repeal of §61.1011, concerning public education grant (PEG) supplemental payments. The section establishes provisions for a supplemental PEG allotment payment to districts with a certain wealth per student. The proposed repeal is necessary because of changes made to school finance law by House Bill (HB) 1, 79th Texas Legislature, Third Called Session, 2006.

The Texas Education Code (TEC), §29.203(b), as added by HB 318, 75th Texas Legislature, 1997, authorized the commissioner of education to adopt rules to implement the provision of a supplemental PEG allotment payment to districts with a certain wealth per student. The commissioner exercised rulemaking authority to adopt 19 TAC §61.1011, Public Education Grant Supplemental Payments, effective September 1, 1998.

Section 61.1011 establishes a PEG supplemental payment calculation for supplemental payments to districts "with property wealth per student greater than the guaranteed wealth level but less than the equalized wealth level." Because of statutory

changes made by HB 1, 79th Texas Legislature, Third Called Session, 2006, that modified the state school finance system, this category of school districts no longer exists, and the calculation methodology provided in the rule is obsolete.

The proposed repeal of 19 TAC §61.1011 would repeal an outdated rule.

The proposed repeal has no procedural and reporting implications. The proposed repeal has no locally maintained paperwork requirements.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed repeal.

Ms. Beaulieu has determined that for each year of the first five years the proposed repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to reflect statutory changes and remove obsolete provisions from rule. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins February 25, 2011, and ends March 28, 2011. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on February 25, 2011.

The repeal is proposed under the TEC, §29.203(b), which authorizes the commissioner of education to adopt rules to implement the provision of a supplemental public education grant allotment payment to districts with a certain wealth per student.

The repeal implements the TEC, §29.203(b).

§61.1011. Public Education Grant Supplemental Payments.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100598
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 475-1497

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19 TAC §61.1016

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Education Agency or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Education Agency (TEA) proposes the repeal of §61.1016, concerning school finance. The section establishes provisions for additional funds under House Bill (HB) 1, General Appropriations Act, Rider 82, 78th Texas Legislature, 2003. The proposed repeal is necessary to remove obsolete provisions from rule. The rule provided for the administration of an allotment that is no longer available, and its provisions were applicable only to certain school years that have already passed.

HB 1, General Appropriations Act, Rider 82, 78th Texas Legislature, 2003, authorized additional funding to school districts and charter schools in the amount of $110 per student in weighted average daily attendance (WADA) for the 2003-2004 and 2004-2005 school years. The rider directed the TEA to adopt rules as necessary to carry out this provision, and the TEA, after consultation with the Office of the Governor and the Legislative Budget Board, adopted 19 TAC §61.1016 in response to this directive.

The 79th Texas Legislature reauthorized the $110 per WADA allotment through Senate Bill 1, General Appropriations Act Rider 69, in 2005. However, with the subsequent passage of HB 1 by the 79th Texas Legislature, Third Called Session, 2006, this allotment was subsumed within each district's "revenue target," the amount of state and local funding guaranteed to the district for adopting a specified maintenance and operations tax rate.

Although districts still received the benefit of the allotment in the calculation of their revenue targets--and continue to receive the benefit since the current revenue target is based on the funding received in prior school years--districts no longer receive a direct allotment, and no specific appropriation for the allotment has been made since the 2005-2006 biennium.

The proposed repeal of 19 TAC §61.1016 would repeal a rule that is no longer necessary.

The proposed repeal has no procedural and reporting implications. The proposed repeal has no locally maintained paperwork requirements.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed repeal.

Ms. Beaulieu has determined that for each year of the first five years the proposed repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to remove obsolete provisions from rule. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins February 25, 2011, and ends March 28, 2011. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14

calendar days after notice of the proposal has been published in the *Texas Register* on February 25, 2011.

The repeal is proposed under HB 1, General Appropriations Act, Rider 82, 78th Texas Legislature, 2003, which authorized the TEA to develop and promulgate rules as necessary to carry out the delivery of funds specifically authorized in Rider 82.

The repeal implements HB 1, General Appropriations Act, Rider 82, 78th Texas Legislature, 2003.

§61.1016. Delivery of Funds per House Bill 1, Rider 82, 2003.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100597
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 475-1497

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CHAPTER 62. COMMISSIONER'S RULES CONCERNING THE EQUALIZED WEALTH LEVEL

19 TAC §62.1061

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Education Agency or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Education Agency proposes the repeal of §62.1061, concerning the equalized wealth level. The section establishes provisions relating to the election of trustees of districts consolidated by the commissioner of education. The proposed repeal would remove a provision from rule that is specified in statute.

The Texas Education Code (TEC), §41.006(b), permits the commissioner to modify the date specified in the TEC, §41.253(b), for elections of trustees of school districts consolidated by the commissioner. The commissioner exercised rulemaking authority to adopt 19 TAC §62.1061, Election of Trustees of District Consolidated by Commissioner, effective September 13, 1993, and amended to be effective May 7, 2003. Subsequently, the date specified in the TEC, §41.253(b), was amended by House Bill 57, Section 4, 79th Texas Legislature, 2005, to be the same as the date specified in 19 TAC §62.1061. Because the election date the rule was created to modify has been modified in statute, the rule is no longer needed.

The proposed repeal has no procedural and reporting implications. The proposed repeal has no locally maintained paperwork requirements.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local government, including local school districts and open-enrollment charter schools, as a result of enforcing or administering the proposed repeal.

Ms. Beaulieu has determined that for each year of the first five years the proposed repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to remove an unnecessary provision from rule.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins February 25, 2011, and ends March 28, 2011. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on February 25, 2011.

The repeal is proposed under the TEC, §41.006, which authorizes the commissioner of education to adopt rules necessary for the implementation of the TEC, Chapter 41, Equalized Wealth Level.

The repeal implements the TEC, §41.006.

§62.1061. Election of Trustees of District Consolidated by Commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100591
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 475-1497

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CHAPTER 62. COMMISSIONER'S RULES CONCERNING THE EQUALIZED WEALTH LEVEL

The Texas Education Agency (TEA) proposes the repeal of and new §62.1071, concerning the equalized wealth level. The section establishes provisions relating to the administration of wealth equalization. The proposed repeal would remove outdated provisions from rule. The proposed new section would replace those outdated provisions with a manual on wealth equalization requirements that would be updated and adopted as a part of the Texas Administrative Code (TAC) each year.

Through 19 TAC §62.1071, adopted to be effective June 11, 1998, and last amended to be effective May 9, 2004, the commissioner exercised rulemaking authority relating to administration of wealth equalization.

Current 19 TAC §62.1071, Administration of Wealth Equalization, proposed for repeal describes identification of school dis-

tricts subject to wealth equalization; provides an alternative calculation of wealth, now outdated, for certain districts; explains how property-wealthy districts are to equalize wealth; provides a method for calculating costs to equalize wealth, now obsolete; sets forth administrative requirements, now outdated; provides consequences for noncompliance; explains that a certain exemption, now obsolete, does not apply for purposes of wealth equalization; and describes how adjustments to property value for property value declines are made. Repeal of the rule is necessary to remove outdated and obsolete provisions from rule.

The most-current requirements that school districts subject to wealth equalization must meet are specified in each annual manual for districts subject to wealth equalization. Legal counsel with the TEA has advised that the procedures contained in each annual manual for districts subject to wealth equalization be adopted as part of the TAC. Proposed new 19 TAC §62.1071, Manual for Districts Subject to Wealth Equalization, would adopt in rule the official TEA publication *Manual for Districts Subject to Wealth Equalization 2010-2011 School Year,* revised January 2011, as Figure: 19 TAC §62.1071(a). The intent is to annually update 19 TAC §62.1071 to refer to the most recently published manual. Manuals adopted for previous school years will remain in effect with respect to those school years.

Each annual manual for districts subject to wealth equalization explains how districts subject to wealth equalization are identified; the fiscal, procedural, and administrative requirements those districts must meet; and the consequences for not meeting requirements. The manual also provides information on using the online Foundation School Program (FSP) System to fulfill certain requirements.

The proposed rule actions would place the specific procedures contained in the *Manual for Districts Subject to Wealth Equalization 2010-2011 School Year* in the TAC. The TEA administers the wealth equalization provisions of the TEC, Chapter 41, according to the procedures specified in each annual manual for districts subject to wealth equalization. Data reporting requirements are addressed primarily through the online FSP System. Districts that are subject to the provisions of the TEC, Chapter 41, and that wish to be considered for a property value adjustment based on a rapid decline in property value must submit a form indicating the district's estimated taxable value for the current year to the TEA by mail or fax. The form must be signed by the chief appraiser of the county appraisal district. The proposed rule actions would have no locally maintained paperwork requirements.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the proposed rule actions are in effect there will be no fiscal implications for state or local government, including local school districts and open-enrollment charter schools, as a result of enforcing or administering the proposed rule actions. The proposal places in rule the current procedures for administration of wealth equalization.

Ms. Beaulieu has determined that for each year of the first five years the proposed rule actions are in effect the public benefit anticipated as a result of enforcing the repeal and new section will be to remove obsolete provisions from rule and to inform the public of the existence of an annual publication specifying requirements for school districts subject to wealth equalization. There is no anticipated economic cost to persons who are required to comply with the proposed rule actions.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins February 25, 2011, and ends March 28, 2011. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on February 25, 2011.

19 TAC §62.1071

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Education Agency or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under the Texas Education Code (TEC), §41.006, which authorizes the commissioner of education to adopt rules necessary for the implementation of the TEC, Chapter 41.

The repeal implements the TEC, §41.006.

§62.1071. Administration of Wealth Equalization.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100592
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 475-1497

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19 TAC §62.1071

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §62.1071 is not included in the print version of the Texas Register. The figure is available in the on-line version of the February 25, 2011, issue of the Texas Register.)

The new section is proposed under the Texas Education Code (TEC), §41.006, which authorizes the commissioner of education to adopt rules necessary for the implementation of the TEC, Chapter 41.

The new section implements the TEC, §41.006.

§62.1071. Manual for Districts Subject to Wealth Equalization.

(a) The processes and procedures that the Texas Education Agency (TEA) uses in the administration of the provisions of the Texas Education Code (TEC), Chapter 41, and the fiscal, procedural, and

administrative requirements that school districts subject to the TEC, Chapter 41, must meet are described in the official TEA publication *Manual for Districts Subject to Wealth Equalization 2010-2011 School Year,* revised January 2011, provided in this subsection.
Figure: 19 TAC §62.1071(a)

(b) The specific processes, procedures, and requirements used in the manual for districts subject to wealth equalization are established annually by the commissioner of education and communicated to all school districts.

(c) School district actions and inactions in previous school years and data from those school years will continue to be subject to the annual manual for districts subject to wealth equalization with respect to those years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100593
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 164. PHYSICIAN ADVERTISING

22 TAC §§164.2, 164.4, 164.6

The Texas Medical Board (Board) proposes amendments to §164.2, concerning Definitions, §164.4, concerning Board Certification, and §164.6, concerning Required Disclosures on Websites.

The amendment to §164.2 adds definitions for applicants, application, board, and certifying board.

The amendment to §164.4 establishes the process for applicants to have certifying boards approved by the Medical Board for purposes of advertising.

The amendment to §164.6 provides that this section applies only to licensees who bill for services provided via the Internet.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to establish definitions for the process of recognizing certifying boards for advertising purposes; to establish procedures for rules previously adopted regarding the recognition of certifying boards for advertising purposes and to not put unnecessary requirements on physicians who maintain websites for purposes other than providing direct medical care.

Mrs. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. The effect to individuals required to comply with these rules as proposed will be $400 per person who applies for initial recognition of a certifying board for advertising purposes, and then applies for renewal of the recognition after the passage of five years. There will be no effect on small or micro businesses.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§164.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the contents clearly indicate otherwise.

(1) Advertising and advertisement--Informational communication to the public in any manner designed to attract public attention to the practice of a physician. Advertising may include oral, written, broadcast, and other types of communications disseminated by or at the behest of a physician. The communications covered include, but are not limited to, those made to patients, prospective patients, professionals or other persons who might refer patients, and to the public at large. The communications covered include signs, nameplates, professional cards, announcements, letterheads, listings in telephone directories and other directories, brochures, radio and television appearances, and information disseminated on the Internet or Web.

(2) A testimonial--An attestation or implied attestation to the competence of a physician's service or treatment. Testimonials also include expressions of appreciation or esteem, a character reference, or a statement of benefits received. Testimonials are not limited to patient comments but may also include comments from colleagues, friends, family, actors, models, fictional characters, or other persons or entities.

(3) Applicant--An individual physician requesting recognition of his or her certifying board for the physician's advertising purposes or a certifying board requesting recognition as an entity for its diplomates.

(4) Application--An application is all documents and information necessary to complete an applicant's request including the following:

(A) forms or addenda furnished by the board, completed by the applicant, typed, printed in ink, or completed online if requiring a written response;

(B) documentation furnished by the certifying board as required; and

(C) the required fee.

(5) Board--The Texas Medical Board.

(6) Certifying board--Entity requesting recognition by the Texas Medical Board.

§164.4. Board Certification.

(a) - (i) (No change.)

(j) Application for board certification approval for the purpose of advertising.

(1) Applicants for approval of board certification under subsection (b) of this section shall complete a written application and payment of an application fee as set out in §175.1 of this title (relating to Application Fees).

(2) Applicants whose applications have been filed with the board in excess of one year will be considered expired. Any fee previously submitted with that application shall be forfeited. Any further request for board certification recognition will require submission of a new application and inclusion of the current application fee. An extension to an application may be granted under certain circumstances, including:

(A) Delay by board staff in processing an application;

(B) A committee of the board requires an applicant to meet specific additional requirements for approval and the application will expire prior to deadline established by the Committee; or

(C) Applicant requires a reasonable, limited additional period of time to obtain documentation after completing all other requirements and demonstrating diligence in attempting to provide the required documentation.

(3) If the executive director determines that an application meets all qualifications, the application shall be presented to a committee of the board for review and approval.

(4) If the Executive Director determines that the applicant does not clearly meet all requirements, the executive director shall notify the applicant and the applicant may appeal that decision to a committee of the board.

(5) Disapproval Determination.

(A) If a committee of the board or the full board determines that an applicant's certifying board does not meet the board's requirements for approval, the applicant shall be notified of the disapproval determination.

(B) If an applicant's certifying board is disapproved, the applicant may request a rehearing of the application before a committee of the board. The request must be made within 20 days receipt of notice of the disapproval determination. It is at the discretion of the committee whether to grant a rehearing. The request for rehearing must be based on information not previously presented to or considered.

(6) A certifying board approved by the board under this subsection must be reviewed every five years from the date of initial approval and the board must obtain information of any substantive changes in the certifying board's requirements for diplomates since the certifying board was last reviewed by the board. In addition, a renewal fee as set out §175.2 of this title (relating to Registration and Renewal Fees) must be paid by an applicant to have the certifying board reviewed.

§164.6. Required Disclosures on Websites.

(a) Disclosure. A licensee that maintains a website in relation to the license's professional practice must clearly disclose:

(1) ownership of the website;

(2) specific services provided;

(3) office address and contact information;

(4) licensure and qualifications of physician(s) and associated health care providers;

(5) fees for online consultation and services and how payment is to be made;

(6) financial interest in any information, products, or services;

(7) appropriate uses and limitations of the site, including providing health advice and emergency health situations;

(8) uses and response times for e-mails, electronic messages, and other communications transmitted via the site;

(9) to whom patient health information may be disclosed and for what purpose;

(10) rights of patients with respect to patient health information; and

(11) information collected and any passive tracking mechanisms utilized.

(b) Accountability. Licensees must provide patients with a clear mechanism to:

(1) access, supplement, and amend patient-provided personal health information;

(2) provide feedback regarding the site and the quality of information and services; and

(3) register complaints, including information regarding filing a complaint with the Texas Medical Board as provided for in Chapter 178 of this title (relating to Complaints).

(c) Advertising/Promotion of Goods or Products. Advertising or promotion of goods or products that a licensee sells outside the normal course of business from which the physician receives direct remuneration or incentives is prohibited.

(d) This section applies only to licensees who bill for services provided via the Internet.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100553
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 305-7016

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CHAPTER 166. PHYSICIAN REGISTRATION

22 TAC §166.7

The Texas Medical Board (Board) proposes new §166.7, concerning Report of Impairment on Registration Form.

The new section provides that if a licensee has an impairment that affects a licensee's ability to actively practice medicine, the licensee shall be given the opportunity to place the license on retired status, convert the license to an administrative medicine license, cancel the license, or be referred to the Texas Physician Health Program.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing

the proposal will be to establish procedures to provide licensees with options when they have impairments that affect their ability to safely practice, and to provide the public with safeguards to assist the safe practice of medicine.

Mrs. Leshikar has also determined that for the first five-year period the section is in effect there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed, unless the individual participates in the Texas Physician Health Program that has an annual cost of $1,200 per year per participant. There will be no effect on small or micro businesses.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The new rule is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The new rule is also authorized by Texas Occupations Code, §156.001 et seq., §164.061, and §167.005.

No other statutes, articles or codes are affected by this proposal.

§166.7. Report of Impairment on Registration Form.

(a) A licensee who reports an impairment that affects the licensee's ability to actively practice medicine as defined by §163.11(a) of this title (relating to Active Practice of Medicine) shall be given written notice of the following:

(1) based on the licensee's impairment, the licensee may request:

(A) to be placed on retired status pursuant to §166.3 of this title (relating to Retired Physician Exception);

(B) to have the licensee's license converted to an administrative medicine license as defined under §172.17 of this title (relating to Limited License for Practice of Administrative Medicine) if the licensee's impairment is solely physical, however, the licensee will not be required to comply with §172.17(d) of this title regarding initial application for a administrative medicine license;

(C) to cancel the licensee's license pursuant to §196.1 of this title (relating to Relinquishment of License); or

(D) to be referred to the Texas Physician Health Program pursuant to Chapter 180 of this title (relating to Texas Physician Health Program and Rehabilitation Orders); and

(2) that failure to respond to the written notice or otherwise not comply with paragraph (1) of this subsection within 45 days shall result in a referral to the Board's Investigation Division for possible disciplinary action.

(b) The Board shall provide written notice as described in subsection (a) of this section within 30 days of receipt of the licensee's registration form indicating the licensee's impairment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100566
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 305-7016

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CHAPTER 175. FEES AND PENALTIES

22 TAC §175.1, §175.2

The Texas Medical Board (Board) proposes amendments to §175.1, concerning Application Fees, and §175.2, concerning Registration and Renewal Fees.

The amendment to §175.1 establishes the fee for the application of a certifying board evaluation at $200.

The amendment to §175.2 establishes the fee for the application for certifying board evaluation renewals at $200.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to establish a fee for the Board's time needed to review an application for a certifying board evaluation.

Mrs. Leshikar has also determined that for the first five-year period the sections are in effect the fiscal implication to state or local government as a result of enforcing these sections as proposed is undetermined as it will depend on the number of applicants and how much staff time is necessary to process the applications. The intent of the fee though is to offset costs to the agency. The effect to individuals required to comply with these rules as proposed will be $200 per initial application and $200 per renewal application if an individual elects to request that the applicant's certifying board be recognized for advertising purposes. There will be no effect on small or micro businesses.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendments are also authorized by §153.051, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§175.1. Application Fees.

The board shall charge the following fees for processing an application for a license or permit:

(1) Physician Licenses:

(A) Full physician license (includes surcharge of $215)--$1002.

(B) Telemedicine license (includes surcharge of $215)--$1002.

(C) Administrative medicine license (includes surcharge of $215)--$1002.

(D) Reissuance of license following revocation (includes surcharge of $205)--$885.

(E) Temporary license:

(i) State health agency--$50.

(ii) Visiting physician--$-0-.

(iii) Visiting professor--$167.

(iv) National Health Service Corps--$-0-.

(v) Faculty temporary license (includes surcharges of $280)--$737.

(vi) Postgraduate Research Temporary License--$-0-.

(vii) provisional license--$107.

(F) Licenses and Permits relating to Medical Education:

(i) Initial physician in training permit (includes surcharge of $5)--$202.

(ii) Physician in training permit for program transfer (includes surcharge of $4)--$131.

(iii) Evaluation or re-evaluation of postgraduate training program--$250.

(iv) Physician in training permit for applicants performing rotations in Texas (includes surcharge of $3)--$120.

(2) Physician Assistants:

(A) Physician assistant license (includes surcharge of $5)--$205.

(B) Reissuance of license following revocation (includes surcharge of $5)--$205.

(C) Temporary license--$107.

(3) Acupuncturists/AcudetoxSpecialists/Continuing Education Providers:

(A) Acupuncture licensure (includes surcharge of $5)--$305.

(B) Temporary license for an acupuncturist--$107.

(C) Acupuncturist distinguished professor temporary license--$50.

(D) Acudetox specialist certification (includes surcharge of $2)--$52.

(E) Continuing acupuncture education provider--$50.

(F) Review of a continuing acupuncture education course--$25.

(G) Review of continuing acudetox acupuncture education courses--$50.

(4) Non-Certified Radiologic Technician permit (includes surcharge of $2)--$52.

(5) Non-Profit Health Organization initial certification--$2,500.

(6) Surgical Assistants:

(A) Surgical assistant licensure--$300.

(B) Temporary license--$50.

(7) Criminal History Evaluation Letter--$100.

(8) Certifying board evaluation--$200.

§175.2. Registration and Renewal Fees.

The board shall charge the following fees to continue licenses and permits in effect:

(1) Physician Registration Permits:

(A) Initial biennial permit (includes surcharges of $496)--$813.

(B) Subsequent biennial permit (includes surcharges of $492)--$809.

(C) Additional biennial registration fee for office-based anesthesia--$210 (includes surcharge of $10).

(2) Physician Assistant Registration Permits:

(A) Initial annual permit (includes surcharges of $10)--$257.50.

(B) Subsequent annual permit (includes surcharges of $6)--$253.50.

(3) Acupuncturists/Acudetox Specialists Registration Permits:

(A) Initial annual permit for acupuncturist (includes surcharges of $10)--$322.50.

(B) Subsequent annual permit for acupuncturist (includes surcharges of $6)--$318.50.

(C) Annual renewal for acudetox specialist certification--$87.50.

(4) Non-Certified Radiologic Technician permit annual renewal (includes surcharge of $3)--$115.50.

(5) Non-Profit Health Organization biennial recertification--$1,125.

(6) Surgical Assistants registration permits:

(A) Initial biennial permit (includes surcharges of $6)--$531.

(B) Subsequent biennial permit (includes surcharges of $2)--$527.

(7) Certifying board evaluation renewal--$200.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100554
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 305-7016

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CHAPTER 187. PROCEDURAL RULES
SUBCHAPTER G. SUSPENSION BY OPERATION OF LAW

22 TAC §§187.70 - 187.72

The Texas Medical Board (Board) proposes amendments to §187.70, concerning Purposes and Construction, §187.71, concerning Hearing Before a Panel of Board Representatives, and §187.72, concerning Decision of the Panel.

The amendment to §187.70 provides that the Board may automatically suspend the license of a physician who has been found guilty of certain drug-related felonies by a trier of fact.

The amendment to §187.71 provides that the Board may conduct a hearing in order for the purpose of determining whether to automatically suspend the license of a physician who has been found guilty of certain drug-related felonies by a trier of fact.

The amendment to §187.72 provides that if a disciplinary panel of the board elects to automatically suspend the license of a physician that the order shall be considered administratively final for purposes of appeal. In addition, if a panel recommends the automatic suspension of a license, the panel shall also either offer an order with terms on how the suspension may be probated or that the physician's license should be revoked.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to ensure that the Board automatically suspends the licenses of those physicians in accordance with the Medical Practice Act in order to protect the public health and welfare; to establish consistent procedures for the automatic suspension of a physician's license and to ensure that the Board takes appropriate steps after a physician's license has been automatically suspended to ensure that the Board takes all necessary actions when a licensee has been convicted of a felony or incarcerated for a criminal offense.

Mrs. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendments are also authorized by §164.057, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§187.70. Purposes and Construction.

The purpose of this subchapter is to set forth a procedure for the suspension of a medical license in the case of initial conviction of certain offenses, initial findings by a trier of fact of guilt of certain drug-related felonies, or the incarceration of a physician in a state or federal penitentiary, as provided in §§164.057 - 164.058 of the Act. The board interprets this statute as providing for suspension by operation of law and that an initial conviction occurs when there has been adjudication of guilt of the offense charged. Since the board's role in such circumstances is limited to whether the licensee has been initially convicted of certain offenses or is incarcerated, the board has determined that the procedures set forth in this subchapter will provide due process to the licensee and protect the public.

§187.71. Hearing before a Panel of Board Representatives.

(a) Upon receipt of information that a licensee has been initially convicted of certain offenses, found guilty by a trier of fact of certain drug-related felonies, or is incarcerated, the board shall schedule a hearing before a panel of board representatives at the earliest practicable time after providing the licensee with at least ten days notice.

(b) The panel shall be composed of at least two members of the board or District Review Committee. At least one member must be a physician and one member must be a public member. The panel may be the same panel that is scheduled for Informal Show Cause and Settlement Conferences.

(c) At the hearing, the licensee shall have the right to respond to the allegations, be represented by counsel, and present evidence or information to the panel.

(d) The panel must base its decision or recommendation on evidence or information that is admissible under §2001.081, Texas Administrative Procedure Act.

(e) If the licensee disputes the fact that the licensee has been initially convicted of the offense, found guilty by a trier of fact of a drug-related felony, or that the licensee is incarcerated, the licensee may present evidence or information. If the licensee admits that the licensee has been initially convicted of an offense, found guilty by a trier of fact of a drug-related felony, or is incarcerated, but requests that the panel probate an order suspending the licensee's medical license, the licensee may present evidence or information showing that probation is authorized by §164.101 and §164.102 of the Act and that the suspension should be probated.

(f) A licensee shall be subject to further disciplinary action when a final conviction of the offense occurs pursuant to §164.051(a)(2) and §164.057(b) of the Act. A final conviction occurs when there has been an adjudication of guilt and a judgment entered.

§187.72. Decision of the Panel.

(a) If the panel determines that the licensee has been initially convicted of an offense, found guilty by a trier of fact of a drug-related felony, or is incarcerated, but does not determine that the suspension should be probated, the panel shall direct the Executive Director to enter an order suspending the medical license of the licensee in accordance with §164.057 or §164.058 of the Act. Because the Act requires suspension, the board has determined that an imminent peril to the public health, safety, or welfare requires immediate effect and the order of the Executive Director shall be effective [~~and final~~] immediately upon entry and considered administratively final for purposes of appealing decision to district court. In addition, the panel shall either offer an agreed order providing the conditions for the lifting of the suspension or refer the matter to SOAH for revocation of the physicians' license. The agreed order shall supersede the order issued by the Executive Director only after the agreed order has been signed by the licensee and approved by the board.

(b) If the panel determines that the suspension should be probated, the panel may recommend the terms and conditions of an agreed

order to be signed by the licensee and presented to the board for approval. The agreed order shall be effective only after being signed by the licensee and approved by the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100555
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 305-7016

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CHAPTER 196. VOLUNTARY RELINQUISHMENT OR SURRENDER OF A MEDICAL LICENSE

The Texas Medical Board (Board) proposes an amendment to §196.1, concerning Relinquishment of License, and the repeal of 196.3, concerning Surrender Associated with Impairment.

The amendment to §196.1 provides that in addition to voluntary relinquishment, a licensee may request cancellation of a license.

The repeal of §196.3 repeals this section as licensees may no longer surrender their license due to an impairment through a confidential rehabilitation order.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the amendment and repeal are in effect the public benefit anticipated as a result of enforcing this proposal will be to establish rules that are consistent with the Board's procedures for the surrender of licenses and to repeal language in order to avoid confusion in the interpretation of the Board's rules.

Mrs. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

22 TAC §196.1

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §164.061, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§196.1. Relinquishment of License.

(a) Relinquishment by licensee.

(1) A licensee may at any time voluntarily relinquish or request cancellation of his or her license to practice medicine in Texas for any reason, without compulsion.

(2) Requests to relinquish or cancel a license must be submitted to the Board in writing.

(b) Acceptance by the board. The board shall accept all voluntary relinquishment requests except when a licensee is under investigation or subject to disciplinary action by the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100556
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 305-7016

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22 TAC §196.3

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Medical Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The repeal is also authorized by §164.061, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§196.3. Surrender Associated with Impairment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100557
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 305-7016

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PART 11. TEXAS BOARD OF NURSING

CHAPTER 213. PRACTICE AND PROCEDURE

22 TAC §213.33

Introduction. The Texas Board of Nursing (Board) proposes amendments to §213.33 (relating to Factors Considered for Imposition of Penalties/Sanctions). These amendments are proposed under the Occupations Code §§301.452, 301.453, and 301.151 and formalize the Board's historical practice regarding default cases.

The Board is charged with protecting the health and safety of the public. One way in which the Board fulfills this obligation is by regulating the conduct of its licensees. When a licensee commits a violation of the Nursing Practice Act (Occupations Code Chapter 301), the Board is authorized to take disciplinary action against the licensee. The goal of the disciplinary action is to identify the unsafe, incompetent, or illegal conduct of the licensee and effectuate its remediation. This goal, however, is obviated in default cases. A default case occurs when a licensee, despite being sent proper notice, fails to appear for a formal administrative hearing at the State Office of Administrative Hearings (SOAH). Historically, the Board has revoked the licensee's nursing license in such cases.

At the outset, a licensee has several opportunities to settle a disciplinary matter informally with the Board before it is set for a formal administrative hearing at SOAH. For example, when the Board receives a complaint against a licensee, the Board informs the licensee of the complaint, and the licensee is afforded an opportunity to respond to the allegations. If the complaint is substantiated, the licensee is offered a proposed disciplinary order in an effort to resolve the matter informally. The licensee may accept the proposed order, request changes to the proposed order, or decline the proposed order. The licensee may also request to attend an informal settlement conference at the Board's offices in order to discuss the underlying allegations or the proposed order in greater detail. All licensees are entitled to retain legal counsel at any time during the disciplinary process and to examine evidence collected by the Board. Once all reasonable efforts towards resolving the matter informally have been exhausted, the matter is scheduled for a formal administrative hearing at SOAH. If a licensee purposefully ceases communication with the Board, however, the matter is scheduled for a formal administrative hearing at SOAH without further attempts at resolving the matter informally.

In some instances, a licensee will respond to the initial allegations filed against him/her, but will then cease further communication with the Board. For example, the licensee may stop returning phone calls from Board Staff or may refuse certified mailings from the Board. Although the licensee has been made aware of the pending allegations against him/her and the Board's ongoing investigation, the licensee chooses to ignore the resolution of the matter. As a result, the Board has no choice but to set the matter for resolution through a formal administrative hearing at SOAH. The Board sends a written notice of the scheduled administrative hearing to the licensee. However, the licensee typically ignores or rejects this mailing and fails to appear for the scheduled administrative hearing. The Board then revokes the licensee's nursing license.

The goal of a disciplinary action is to effectuate the successful remediation of the unsafe, incompetent, or illegal conduct of a licensee. In order to accomplish this, a licensee must first acknowledge that his/her conduct is a violation of the Nursing Practice Act. The licensee must then be willing to comply with the Board's requirements for the remediation of the conduct. Depending upon the nature of the licensee's conduct, the Board may require the licensee to complete remedial education courses, to undergo random drug screening, or to participate in therapy. The Board may also require the licensee to be supervised or periodically evaluated by his/her employer. In order for the remediation to be successful, the licensee must understand the Board's requirements and be willing to comply with them. This cannot occur in a default case.

Once a licensee stops responding to the Board's efforts to resolve a disciplinary matter, few options remain for assuring the remediation of the licensee's conduct. Because the licensee refuses to communicate with the Board, the licensee cannot accept responsibility for his/her conduct or the Board's requirements for the remediation of such conduct. As a result, the Board cannot be assured that the licensee's conduct will be successfully remediated, and the licensee remains a risk to the public health and safety. This concern, however, is alleviated if the individual's nursing license is revoked. Once revoked, the individual cannot continue to practice nursing, and the risk to the public health and safety is significantly reduced, if not eliminated altogether. Further, if the licensee wishes to have his/her nursing license reinstated, the licensee must reestablish communication with the Board. Once communication is reestablished, the Board can address its requirements for reinstating the licensee's nursing license, the licensee's underlying conduct, and any requirements for the successful remediation of the conduct.

The revocation of a licensee's nursing license in a default case also enables the Board to resolve disciplinary cases in a more efficient manner, as it eliminates the need to initiate repetitive disciplinary proceedings against the same licensee for noncompliance with a prior Board order. A licensee is subject to disciplinary action under the Nursing Practice Act for noncompliance with the terms of a prior Board order. A licensee who has repeatedly ignored or rejected mailings from the Board and who fails to appear for a scheduled administrative hearing at SOAH is unlikely to successfully complete the requirements of a Board order, as the licensee would not be aware that the order was even issued. When the licensee fails to comply with the terms of the Board order, the Board is forced to initiate repetitive disciplinary proceedings against the licensee for noncompliance with the Board order. This begins a cycle of noncompliance, wherein escalating disciplinary orders are issued for the licensee's noncompliance, until the licensee's noncompliance ultimately results in the revocation of his/her nursing license. The initial revocation of the licensee's nursing license eliminates this unnecessary redundancy and conserves state resources. Further, the licensee may apply for reinstatement of his/her nursing license, at which time the Board may address the licensee's underlying conduct and the requirements for the successful remediation of the conduct.

Section-by-Section Overview. The following is a section-by-section overview of the proposal.

Proposed new §213.33(m) states that, notwithstanding any other provision herein, a person's failure to appear in person or by attorney on the day and at the time set for hearing in a contested case shall entitle the Board to revoke the person's license.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments are in effect, there will be no additional fiscal implications for state or local government as a result of implementing the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the adoption of requirements that protect the health and safety of the public and conserve state resources. The Board is charged with protecting the health and safety of the public. One way in which the Board fulfills this obligation is by regulating the conduct of its licensees and taking appropriate disciplinary action for their unsafe, incompetent, or illegal conduct. The Board strives to resolve disciplinary matters informally if possible. However, there are times when the Board must schedule a formal administrative hearing at SOAH. This is especially true in cases where a licensee has ceased communication with the Board. In such cases, the Board cannot negotiate the resolution of the disciplinary matter with the licensee because the licensee refuses to communicate with the Board. The health and safety of the public are of particular concern in these cases. This is because the Board is unable to reach an agreement with the licensee, wherein the licensee acknowledges his/her problematic conduct and agrees to comply with the Board's requirements for the remediation of the conduct. If a licensee acknowledges that his/her conduct violates the Nursing Practice Act, the licensee is more likely to successfully remediate the conduct. This is the Board's ultimate goal. If a licensee can successfully remediate his/her conduct, then it is likely that he/she can provide safe nursing care to the public. However, if a licensee ceases communication with the Board, the Board has no assurance that the licensee understands that his/her conduct constitutes a violation of the Nursing Practice Act or that there is a need for remediation of the conduct. Additionally, a licensee must be willing to comply with the requirements for remediation, which often include limitations on the licensee's practice. If a licensee refuses to respond to the Board's offer of settlement, which includes a careful recitation of the Board's requirements for remediation, the Board also has no assurance that the licensee will remediate his/her conduct, and the licensee's practice remains a threat to the health and safety of the public. In cases where a licensee ceases communication with the Board, the licensee also typically rejects or ignores mailings from the Board, including notices of hearing. As a result, many licensees who have ceased communication with the Board fail to appear for their scheduled administrative hearing at SOAH. The Board has historically revoked the nursing license of such licensees. The proposed amendments formalize the Board's practice and serve to protect the health and safety of the public by ensuring that only those licensees who are willing to successfully remediate their unsafe, incompetent, or illegal conduct are able to continue practicing nursing.

The proposed amendments also help conserve state resources by eliminating redundant disciplinary proceedings for a licensee's noncompliance with a prior Board order. A licensee is subject to disciplinary action for noncompliance with the requirements of a Board order. Issuing a Board order to a licensee in a default case is illogical, as the licensee will not be aware of the issuance of the order because the licensee has refused to communicate with the Board regarding the disciplinary matter and is not present at the scheduled administrative hearing. As a result, the likelihood that the licensee will successfully comply with the requirements of the Board order are very low. Rather, it is much more likely that the licensee will fail to meet the terms of the Board order, thereby initiating a new disciplinary proceeding for his/her noncompliance. This cycle of noncompliance in cases where a licensee refuses to communicate with the Board results in redundant disciplinary proceedings against the same licensee. Not only are these proceedings costly, but they are ineffective in promoting the successful remediation of the licensee's conduct. The proposed amendments eliminate the costs associated with these redundant disciplinary proceedings by authorizing the Board to revoke the licensee's nursing license if the licensee fails to appear for a scheduled administrative hearing at SOAH. Not only does this eliminate the need for redundant disciplinary proceedings against the same licensee, but it also ensures that the licensee cannot practice nursing until he/she agrees to remediate his/her conduct.

Potential Costs of Compliance with the Proposal

The proposal entitles the Board to revoke a licensee's nursing license if the licensee fails to appear in person or by attorney on the day and at the time set for hearing in a contested case. Not every licensee subject to the Nursing Practice Act will be affected by the proposal. Only those licensees who fail to appear for a scheduled administrative hearing at SOAH will be affected by the proposal. There may be associated costs of compliance with the proposal for these individuals. The total probable cost of compliance will vary substantially among licensees and may include the following: (i) costs associated with appealing a license revocation, including attorney fees and filing fees; (ii) costs associated with applying for the reinstatement of a license, including attorney fees, filing fees, and licensure fees; and (iii) potential loss of income.

Not every licensee whose license is revoked under the proposal will be affected by all of these potential costs. For example, not all licensees will choose to hire an attorney to appeal a license revocation. For those licensees that choose to do so, the associated cost of compliance will vary substantially among licensees, depending primarily upon the rate charged by the attorney and the amount of time expended by the attorney. Further, a particular attorney may charge a higher rate depending upon his/her qualifications. For example, an attorney that is board certified in administrative law may charge a higher rate than an attorney that is not. A licensee is not required to retain counsel, however, to appeal a license revocation. Further, a licensee is free to choose the most economical method of representation available. Other costs associated with appealing a license revocation may include the preparation of a motion for rehearing and a method of transmitting the motion to the Board. A licensee may choose the most economical method of transmitting a motion for rehearing to the Board, including transmitting the motion via regular U.S. mail, facsimile, or e-mail. If the motion for rehearing is denied by the Board, a licensee may also choose to file an appeal in district court. Costs associated with this process may include the preparation of the appeal and any filing fees charged by the district court. Other costs may include service of process fees and fees related to the preparation of an administrative record. Each licensee, however, has the information necessary to estimate these individual costs.

The total probable cost associated with the reinstatement of a license will also vary substantially among licensees, depending upon whether the licensee hires an attorney to prepare a reinstatement application. Not all licensees who file a reinstatement application will choose to hire an attorney to prepare the application. For those that choose to do so, the associated cost of compliance will vary substantially among licensees, depending upon the rate charged by the attorney and the amount of time expended by the attorney. Further, a particular attorney may charge a higher rate depending upon his/her qualifications. For example, an attorney that is board certified in administrative law may charge a higher rate than an attorney that is not. However,

a licensee is not required to retain counsel to file a reinstatement application. Further, a licensee is free to choose the most economical method of representation available. Other costs associated with filing a petition for reinstatement may include the preparation of the application, the completion of a requisite amount of continuing education hours, as required by other Board rules, and filing fees and/or fines. Each licensee, however, has the information necessary to estimate these individual costs.

The total probable cost associated with the reinstatement of a license will also depend upon the underlying conduct of the licensee that precipitated the license revocation. Additional remediation, such as random drug screening or additional remedial education courses, may be required for more serious underlying conduct. Such remediation carries an additional associated cost. For example, a licensee may be required to undergo random drug screening for a period of time. In such a situation, the licensee would be responsible for paying for the random drug screens. Further, certain remedial education courses carry a higher cost than others, depending upon whether a clinical component is required as part of the course or whether the licensee must attend the course in person. Less serious underlying conduct, however, may not require the same level of remediation, and as a result, may carry less of an associated cost of compliance. Each licensee, however, has the information necessary to estimate these individual costs.

A licensee's potential loss of income will also vary substantially among licensees based upon the amount of income earned by the licensee. The larger the amount of income earned by the licensee, the larger the associated cost of compliance. A portion of this cost may be somewhat defrayed, however, if the licensee is able to obtain new employment at the same level of income, or at a similar rate. Each licensee has the information necessary to estimate these individual costs.

A licensee may avoid all compliance costs if he/she maintains communication with the Board throughout the disciplinary process and attends all scheduled administrative hearings at SOAH. Finally, any other costs of compliance with §213.33 result from the legislative enactment of the Occupations Code Chapter 301 and are not a result of the adoption, enforcement, or administration of this proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposed amendments will not have an adverse economic effect on any small or micro business, as defined by the Government Code §2006.001(1) or (2), because no small or micro business is affected by or required to comply with the proposal. The Government Code §2006.001(1) defines a micro business as a legal entity, including a corporation, partnership, or sole proprietorship that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has not more than 20 employees. The Government Code §2006.001(2) defines a small business as a legal entity, including a corporation, partnership, or sole proprietorship, that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has fewer than 100 employees or less than $6 million in annual gross receipts. Each of the elements in §2006.001(1) and (2) must be met in order for an entity to qualify as a micro business or small business. The only entities subject to or affected by the proposed amendments are individual licensees. Individual licensees do not meet the definition of a small or micro business under the Government Code §2006.001(1) or (2). Therefore, the Board is not required to prepare a regulatory flexibility analysis.

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on March 28, 2011, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.state.tx.us, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the Occupations Code §§301.452, 301.453, and 301.151.

Section 301.452(a) defines "intemperate use" as including practicing nursing or being on duty or on call while under the influence of alcohol or drugs.

Section 301.452(b) states that a person is subject to denial of a license or to disciplinary action under Subchapter J for: (i) a violation of Chapter 301, a rule or regulation not inconsistent with Chapter 301, or an order issued under Chapter 301; (ii) fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing; (iii) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude; (iv) conduct that results in the revocation of probation imposed because of conviction for a felony or for a misdemeanor involving moral turpitude; (v) use of a nursing license, diploma, or permit, or the transcript of such a document, that has been fraudulently purchased, issued, counterfeited, or materially altered; (vi) impersonating or acting as a proxy for another person in the licensing examination required under §301.253 or §301.255; (vii) directly or indirectly aiding or abetting an unlicensed person in connection with the unauthorized practice of nursing; (viii) revocation, suspension, or denial of, or any other action relating to, the person's license or privilege to practice nursing in another jurisdiction; (ix) intemperate use of alcohol or drugs that the board determines endangers or could endanger a patient; (x) unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public; (xi) adjudication of mental incompetency; (xii) lack of fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public; or (xiii) failure to care adequately for a patient or to conform to the minimum standards of acceptable nursing practice in a manner that, in the Board's opinion, exposes a patient or other person unnecessarily to risk of harm.

Section 301.452(c) provides that the Board may refuse to admit a person to a licensing examination for a ground described under §301.452(b).

Section 301.452(d) states that the Board by rule shall establish guidelines to ensure that any arrest information, in particular information on arrests in which criminal action was not proven or charges were not filed or adjudicated, that is received by the Board under §301.452 is used consistently, fairly, and only to the extent the underlying conduct relates to the practice of nursing.

Section 301.453(a) states that, if the Board determines that a person has committed an act listed in §301.452(b), the Board shall enter an order imposing one or more of the following: (i) denial of the person's application for a license, license renewal, or temporary permit; (ii) issuance of a written warning; (iii) administration of a public reprimand; (iv) limitation or restriction of

the person's license, including: (A) limiting to or excluding from the person's practice one or more specified activities of nursing; or (B) stipulating periodic board review; (v) suspension of the person's license; (vi) revocation of the person's license; or (vii) assessment of a fine.

Section 301.453(b) states that, in addition to or instead of an action under §301.453(a), the Board, by order, may require the person to: (i) submit to care, counseling, or treatment by a health provider designated by the board as a condition for the issuance or renewal of a license; (ii) participate in a program of education or counseling prescribed by the board, including a program of remedial education; (iii) practice for a specified period under the direction of a registered nurse or vocational nurse designated by the Board; or (iv) perform public service the Board considers appropriate.

Section 301.453(c) states that the Board may probate any penalty imposed on a nurse and may accept the voluntary surrender of a license. The Board may not reinstate a surrendered license unless it determines that the person is competent to resume practice.

Section 301.453(d) states that, if the Board suspends, revokes, or accepts surrender of a license, the Board may impose conditions for reinstatement that the person must satisfy before the Board may issue an unrestricted license.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Cross Reference to Statute. The following statutes are affected by this proposal: Occupations Code §§301.452, 301.453, and 301.151.

§213.33. Factors Considered for Imposition of Penalties/Sanctions.

(a) - (l) (No change.)

(m) Notwithstanding any other provision herein, a person's failure to appear in person or by attorney on the day and at the time set for hearing in a contested case shall entitle the Board to revoke the person's license.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 9, 2011.

TRD-201100533
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 305-6822

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PART 34. TEXAS STATE BOARD OF SOCIAL WORKER EXAMINERS

CHAPTER 781. SOCIAL WORKER LICENSURE

The Texas State Board of Social Worker Examiners (board) proposes new §781.220 and §781.221, concerning the licensure and regulation of social workers who serve as a parenting coordinator or a parenting facilitator. The board also proposes an amendment to §781.401 concerning the licensure and regulation of social workers who hold the Licensed Master Social Worker-Advanced Practitioner specialty recognition.

BACKGROUND AND PURPOSE

The proposals related to parenting coordinators and parenting facilitators are required by House Bill (HB) 1012, 81st Legislature, Regular Session, 2009, amending Family Code, Chapter 153, which requires certain occupational licensing boards to promulgate rules related to the provision of parenting coordination and parenting facilitation services. The proposed sections address parent coordination and parent facilitation. Parent coordinators and parent facilitators are persons appointed by the court to aid the parties and the court in resolving parenting issues, within the limits of the court order of appointment. Parent coordinators are appointed in high conflict situations and report to the court only whether parent coordination should continue. Parent facilitators may deal with similar issues as a parent coordinator, but may report to the court recommendations regarding particular issues between the parties, but not recommendations regarding custody or visitation.

The proposed amendment to §781.401(b)(1)(E) is a result of emerging standards of practice and licensure related to non-clinical social work practice at the Advanced Practitioner/Advanced Generalist level. The previously adopted subparagraph, which created a date by which no more supervision plans would be accepted by the board towards fulfillment of the minimum supervised experience requirements for the LMSW-Advanced Practitioner specialty recognition, and in effect would prohibit issuance of any new LMSW-AP specialty recognitions in the future, is no longer in the best interest of the public and is therefore recommended for deletion.

SECTION-BY-SECTION SUMMARY

New §781.220 is proposed to define the duties and responsibilities of a parent coordinator and establish certain prohibitions and requirements for a licensed social worker who serves as a parent coordinator.

New §781.221 is proposed to define the duties and responsibilities of a parent facilitator and establish certain prohibitions and requirements for a licensed social worker who serves as a parent facilitator. The board delineates between these two types of practice and articulates statutory requirements for implementation in social work practice.

An amendment to §781.401(b)(1)(E) is in the best interest of the public. The board recognizes the continuing need for the Licensed Master Social Worker-Advanced Practitioner specialty recognition and, therefore, the board proposes deletion of subparagraph (E).

FISCAL NOTE

Carol Miller, LMSW-AP, Executive Director, has determined that for each of the first five years the sections are in effect, there will not be fiscal implications to the state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Miller has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Miller has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the effective licensing and regulation of social workers.

REGULATORY ANALYSIS

The board has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The board has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Carol Miller, LMSW-AP, Executive Director, Texas State Board of Social Worker Examiners, Mail Code 1982, P.O. Box 149347, Austin, Texas 78714-9347, or by email to lsw@dshs.state.tx.us. When emailing comments, please indicate "Comments on Proposed Rules" in the subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

SUBCHAPTER B. CODE OF CONDUCT AND PROFESSIONAL STANDARDS OF PRACTICE

22 TAC §781.220, §781.221

STATUTORY AUTHORITY

The new rules are proposed under Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties; and Family Code, Chapter 153, which contains law concerning a parenting coordinator and facilitator.

The new rules affect Occupations Code, Chapter 505; and Family Code, Chapter 153.

§781.220. Parent Coordination.

(a) In accordance with the Family Code, §153.601(3), "parenting coordinator" means an impartial third party:

(1) who, regardless of the title by which the person is designated by the court, performs any function described in the Family Code, §153.606, in a suit; and

(2) who:

(A) is appointed under Family Code, Chapter 153, Subchapter K (relating to Parenting Plan, Parenting Coordinator, and Parenting Facilitator) by the court on its own motion, or on a motion or agreement of the parties, to assist parties in resolving parenting issues through confidential procedures; and

(B) is not appointed under another statute or a rule of civil procedure.

(b) A licensee who serves as a parenting coordinator is not acting under the authority of a license issued by the board, and is not engaged in the practice of social work. The services provided by the licensee who serves as a parenting coordinator are not within the jurisdiction of the board, but rather the jurisdiction of the appointing court.

(c) A licensee who serves as a parenting coordinator has a duty to provide the information in subsection (b) of this section to the parties to the suit.

(d) Records of a licensee serving as a parenting coordinator are confidential under the Civil Practices and Remedies Code, §154.073. Licensees serving as a confidential parenting coordinator shall comply with the Civil Practices and Remedies Code, Chapter 154, relating to the release of information.

(e) A licensee shall not provide social work services to any person while simultaneously providing parenting coordination services. This section shall not apply if the court enters a finding that mental health services are not readily available in the location where the parties reside.

§781.221. Parenting Facilitation.

(a) In accordance with House Bill 1012, 81st Legislature, Regular Session, 2009, and Family Code, Chapter 153, this section establishes the practice standards for licensees who desire to serve as parenting facilitators.

(b) In accordance with the Family Code, §153.601(3-a), a "parenting facilitator" means an impartial third party:

(1) who, regardless of the title by which the person is designated by the court, performs any function described by the Family Code, §153.6061, in a suit; and

(2) who:

(A) is appointed under Family Code, Chapter 153, Subchapter K (relating to Parenting Plan, Parenting Coordinator, and Parenting Facilitator) by the court on its own motion, or on a motion or agreement of the parties, to assist parties in resolving parenting issues through procedures that are not confidential; and

(B) is not appointed under another statute or a rule of civil procedure.

(c) Notwithstanding any other provision of this chapter, licensees who desire to serve as parenting facilitators shall comply with all applicable requirements of the Family Code, Chapter 153, and this section. Licensees shall also comply with all requirements of this chapter unless a provision is clearly inconsistent with the Family Code, Chapter 153, or this section.

(d) In accordance with the Family Code, §153.6102(e), a licensee serving as a parenting facilitator shall not provide other social work services to any person while simultaneously providing parenting facilitation services. This section shall not apply if the court enters a finding that mental health services are not readily available in the location where the parties reside.

(e) A licensee serving as a parenting facilitator utilizes child-focused alternative dispute resolution processes, assists parents in implementing their parenting plan by facilitating the resolution of disputes in a timely manner, educates parents about children's needs, and engages in other activities as referenced in the Family Code, Chapter 153.

(f) A licensee serving as a parenting facilitator shall assist the parties involved in reducing harmful conflict and in promoting the best interests of the children.

(g) A licensee serving as a parenting facilitator functions in four primary areas in providing services.

(1) Conflict management function. The primary role of the parenting facilitator is to assist the parties to work out disagreements regarding the children to minimize conflict. To assist the parents in reducing conflict, the parenting facilitator may monitor the electronic or written exchanges of parent communications and suggest productive forms of communication that limit conflict between the parents.

(2) Assessment function. A parenting facilitator shall review applicable court orders, including protective orders, social studies, and other relevant records to analyze the impasses and issues as brought forth by the parties.

(3) Educational function. A parenting facilitator shall educate the parties about child development, divorce, the impact of parental behavior on children, parenting skills, and communication and conflict resolution skills.

(4) Coordination/case management function. A parenting facilitator shall work with the professionals and systems involved with the family (for example, mental health, health care, social services, education, or legal) as well as with extended family, stepparents, and significant others as necessary.

(h) A licensee serving as a parenting facilitator shall be alert to the reasonable suspicion of acts of domestic violence directed at a parent, a current partner, or children. The parenting facilitator shall adhere to protection orders, if any, and take reasonable measures to ensure the safety of the participants, the children and the parenting facilitator, while understanding that even with appropriate precautions a guarantee that no harm will occur can be neither stated nor implied.

(i) In order to protect the parties and children in domestic violence cases involving power, control and coercion, a parenting facilitator shall tailor the techniques used so as to avoid offering the opportunity for further coercion.

(j) A licensee serving as a parenting facilitator shall be alert to the reasonable suspicion of substance abuse by parents or children, as well as mental health impairment of a parent or child.

(k) A licensee serving as a parenting facilitator shall not provide legal advice.

(l) A licensee serving as a parenting facilitator shall serve by written agreement of the parties and/or formal order of the court.

(m) A licensee serving as a parenting facilitator shall not initiate providing services until the licensee has received and reviewed the fully executed and filed court order or the signed agreement of the parties.

(n) A licensee serving as a parenting facilitator shall maintain impartiality in the process of parenting facilitation. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual.

(o) A licensee serving as a parenting facilitator:

(1) shall terminate or withdraw services if the licensee determines the licensee cannot act in an impartial or objective manner;

(2) shall not give or accept a gift, favor, loan or other item of value from any party having an interest in the parenting facilitation process;

(3) shall not coerce or improperly influence any party to make a decision;

(4) shall not intentionally or knowingly misrepresent or omit any material fact, law, or circumstance in the parenting facilitator process; and

(5) shall not accept any engagement, provide any service, or perform any act outside the role of parenting facilitation that would compromise the facilitator's integrity or impartiality in the parenting facilitation process.

(p) A licensee serving as a parenting facilitator may make referrals to other professionals to work with the family, but shall avoid actual or apparent conflicts of interest by referrals. No commissions, rebates, or similar remuneration shall be given or received by a licensee for parenting facilitation or other professional referrals.

(q) A licensee serving as a parenting facilitator should attempt to bring about resolution of issues by agreement of the parties; however, the parenting facilitator is not acting in a formal mediation role. An effort towards resolving an issue, which may include therapeutic, mediation, education, and negotiation skills, does not disqualify a licensee from making recommendations regarding any issue that remains unresolved after efforts of facilitation.

(r) A licensee serving as a parenting facilitator shall communicate with all parties, attorneys, children, and the court in a manner which preserves the integrity of the parenting facilitation process and considers the safety of the parents and children.

(s) A licensee serving as a parenting facilitator:

(1) may meet individually or jointly with the parties, as deemed appropriate by the parenting facilitator, and may interview the children;

(2) may interview any individuals who provide services to the children to assess the children's needs and wishes; and

(3) may communicate with the parties through face-to-face meetings or electronic communication.

(t) A licensee serving as a parenting facilitator shall, prior to the beginning of the parenting facilitation process and in writing, inform the parties of:

(1) the limitations on confidentiality in the parenting facilitation process; and

(2) the basis of fees and costs and the method of payment, including any fees associated with postponement, cancellation and/or nonappearance, and the parties' pro rata share of the fees and costs as determined by the court order or written agreement of the parties.

(u) Information obtained during the parenting facilitation process shall not be shared outside the parenting facilitation process

except for professional purposes, as provided by court order, by written agreement of the parties, or as directed by the board.

(v) In the initial session with each party, a licensee serving as a parenting facilitator shall review the nature of the parenting facilitator's role with the parents to ensure that they understand the parenting facilitation process.

(w) A licensee serving as a parenting facilitator:

(1) shall comply with all mandatory reporting requirements, including but not limited to Family Code, Chapter 261, concerning abuse or neglect of minors;

(2) shall report to law enforcement or other authorities if they have reason to believe that any participant appears to be at serious risk to harm themselves or a third party;

(3) shall maintain records necessary to support charges for services and expenses, and shall make a detailed accounting of those charges to the parties and their counsel, if requested to do so;

(4) shall maintain notes regarding all communications with the parties, the children, and other persons with whom they speak about the case; and

(5) shall maintain records in a manner that is professional, legible, comprehensive, and inclusive of information and documents that relate to the parenting facilitation process and that support any recommendations made by the licensee.

(x) Records of a licensee serving as a parenting facilitator are not mental health records and are not subject to the disclosure requirements of Health and Safety Code, Chapter 611. At a minimum, records shall be maintained for the period of time described in §781.209(4) of this title (relating to Client Records and Record Keeping), or as otherwise directed by the court.

(y) Records of a licensee serving as a parenting facilitator shall be released on the request of either parent, as directed by the court, or as directed by the board.

(z) Charges for parenting facilitation services shall be based upon the actual time expended by the parenting facilitator, or as directed by the written agreement of the parties, and/or formal order of the court.

(aa) All fees and costs shall be appropriately divided between the parties as directed by the court order of appointment and/or as noted in the parenting facilitators' written fee disclosure to the parties.

(bb) Fees may be disproportionately divided fees if one parent is disproportionately creating a need for services and if such a division is outlined in the court order of appointment and/or as noted in the parenting facilitators' written fee disclosure to the parties.

(cc) Services and activities for which a licensee serving as a parenting facilitator may charge include time spent interviewing parents, children and collateral sources of information; preparation of agreements, correspondence, and reports; review of records and correspondence; telephone and electronic communication; travel; court preparation; and appearances at hearings, depositions and meetings.

(dd) The minimum training for a licensee serving as a parenting facilitator that is required by the Family Code, §153.6101(b), and is determined by the court is:

(1) eight hours of family violence dynamics training provided by a family violence service provider;

(2) 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court;

(3) 24 classroom hours of training in the fields of family dynamics, child development, family law; and

(4) 16 hours of training in the laws and board rules governing parenting coordination and facilitation, and the multiple styles and procedures used in different models of service.

(ee) A licensee serving as a parenting facilitator:

(1) shall complete minimum training as required by the Family Code, §153.6101, as determined by the appointing court;

(2) shall have extensive practical experience with high conflict or litigating parents;

(3) shall complete and document upon request advanced training in family dynamics, child maltreatment, co-parenting, and high conflict separation and divorce; and

(4) shall regularly complete continuing education related to co-parenting issues, high-conflict families and the parenting coordination and facilitation process.

(ff) A licensee serving as a parenting facilitator shall decline an appointment, withdraw, or request appropriate assistance when the facts and circumstances of the case are beyond the licensee's skill or expertise.

(gg) Since parenting facilitation services are addressed under multiple titles in different jurisdictions nationally, acceptability of training to meet the requirements of subsection (bb) of this section is based on functional skills taught during the training rather than the use of specific titles or names.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100579
Timothy M. Brown
Chair
Texas State Board of Social Worker Examiners
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 458-7111 x6972

SUBCHAPTER D. LICENSES AND LICENSING PROCESS

22 TAC §781.401

STATUTORY AUTHORITY

The amendment is proposed under Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties; and Family Code, Chapter 153, which contains law concerning a parenting coordinator and facilitator.

The amendment affects Occupations Code, Chapter 505; and Family Code, Chapter 153.

§781.401. Qualifications for Licensure.

(a) (No change.)

(b) Specialty Recognition. The following education and experience is required for specialty recognitions.

(1) Licensed Master Social Worker-Advanced Practitioner (LMSW-AP).

(A) - (D) (No change.)

[~~(E) Licensees holding the Advanced Practitioner specialty recognition will continue to hold the specialty recognition as long as they renew timely and in accordance with board rules. Individuals under board-approved supervision plans for the Advanced Practitioner specialty recognition as of December 31, 2011 may complete the process. The board will discontinue accepting new board-approved supervision plans for the Advanced Practitioner specialty recognition after December 31, 2011.~~]

(2) (No change.)

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100580
Timothy M. Brown
Chair
Texas State Board of Social Worker Examiners
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 6. OFFICE OF INJURED EMPLOYEE COUNSEL

CHAPTER 276. GENERAL ADMINISTRATION
SUBCHAPTER A. GENERAL PROVISIONS

28 TAC §276.7, §276.8

The Office of Injured Employee Counsel (OIEC) proposes new §276.7 and §276.8, concerning OIEC's standards regarding ethics. Ethics can be defined as moral values, which affect personal and professional actions. Ethical standards are fundamental to the successful operation of an agency to ensure public funds are used efficiently.

There are many areas in which ethical issues may emerge. Common areas are gifts from outside sources, confidentiality, use of state property, outside employment, drug-free workplace, firearms and weapons, political activities, conflict of interest, post-employment, publicity, and fraudulent activity. A detailed guide regarding ethics can be obtained from the Texas Ethics Commission (A Guide to Ethics Laws for State Officers and Employees, Revised April 24, 2008). The Texas Ethics Commission and the Office of the Attorney General are available resources if it is determined clarification is needed on a particular issue.

Texas Labor Code §404.110(b) provides that an employee of the OIEC may not be compelled to disclose information communicated to the employee by an injured employee on any matter relating to the injured employee's claim.

New §276.7 provides for OIEC's ethics statement. New §276.8 provides for the function of OIEC's Ethics Committee and OIEC's Ethics Committee mission statement.

Mr. Brian White, Deputy Counsel/Chief of Staff, has determined that for each year of the first five years the proposed section shall be in effect, there shall be no fiscal impact to state and local governments as a result of the enforcement or administration of this rule. There shall be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. White has determined that for each year of the first five years the proposed new sections are in effect the public and workers' compensation stakeholders will be notified of agency requirements for staff, which include the highest ethical standards of conduct. OIEC's rules will now reflect requirements set in Texas Government Code §572.051 and the agency's handling of ethics issues through the Ethics Committee. New §276.7 and §276.8 ensure ethical issues are addressed promptly and accurately which will safeguard the agency and allow it to more effectively fulfill its mission to assist, educate and advocate on behalf of the injured employees of Texas.

OIEC has determined that the proposal will not have an adverse economic effect on small or micro-business.

OIEC has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225 and therefore a regulatory flexibility analysis is not required.

OIEC has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under the Texas Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on June 10, 2011, to Brian White, Deputy Public Counsel/Chief of Staff, Office of Injured Employee Counsel, Mail Code 50, 7551 Metro Center Drive, Austin, Texas 78744. A request for a public hearing should be submitted separately to the Deputy Public Counsel/Chief of Staff.

The new sections are proposed pursuant to Texas Labor Code §§404.106, 404.1015, 404.110 and 404.111. Section 404.106 provides the public counsel rulemaking authority to adopt rules. Section 404.1015 provides for refusal to provide or terminate services. Section 404.110 provides for applicability to Public Counsel of confidentiality requirements. Section 404.111 provides access to information. Texas Government Code §572.051 provides the standards of conduct and state agency ethics policy.

The following sections are affected by this proposal:

Rules: §276.7 and §276.8

Statute: Texas Labor Code §§404.106, 404.1015, 404.110, 404.111; Texas Government Code §572.051.

§276.7. Agency's Ethics Statement and Employee Requirements.

(a) Each OIEC employee has an obligation to maintain high ethical standards in the performance of their work responsibilities and in their personal life, realizing that lapse in such judgment will reflect negatively on OIEC. OIEC employees must seek to enhance and implement ethical values based on established principals of sound reasoning and the highest standards of business conduct.

(b) An OIEC employee should not:

(1) accept or solicit any gift, favor, or service that might reasonably tend to influence the employee or employee knows or should know is being offered with the intent to influence employee's official conduct;

(2) accept other employment or engage in a business or professional activity that the employee might reasonably expect would require or induce the employee to disclose confidential information acquired by reason of the position;

(3) accept other employment or compensation that could reasonably be expected to impair the employee's independence of judgment in the performance of the employee's official duties;

(4) make personal investments that could reasonably be expected to create a substantial conflict between the employee's private interest and the public interest; or

(5) intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the employee's official powers or employee's official duties in favor of another.

§276.8. Ethics Committee.

(a) OIEC's Ethics Committee shall be made up of OIEC staff who serve two-year staggered terms. The Ethics Committee is made up of the agency's ethics officer, who is an attorney and shall serve as the chair of the committee, and a cross section of employees from various agency programs. The ethics officer also provides training, specific consultation to the Public Counsel and Deputy Public Counsel, and serves as the legal counsel for all matters regarding ethics. The Ethics Committee meets to address ethical issues that are submitted to the committee and to recommend resolution.

(b) The mission statement for OIEC's Ethics Committee is to practice and promote the highest standards of ethical behavior within OIEC. In order to set the highest standards of conduct, including the appearance of propriety in the operation of our goals to assist, educate and advocate on behalf of injured employees in Texas, the members of the Ethics Committee are committed to: assuring honesty and confidentiality in all matters that come before the committee, faithfully adhering to the agency's code of ethics, educating the agency on ethics and standards of conduct, and making recommendations and providing solutions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100567
Brian White
Deputy Public Counsel/Chief of Staff
Office of Injured Employee Council
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 804-4182

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SUBCHAPTER B. OMBUDSMAN PROGRAM

28 TAC §276.13

The Office of Injured Employee Counsel (OIEC) proposes new §276.13, concerning OIEC's Ombudsman Program's mandatory requirements regarding ethics. Ethics are moral values which affect personal and professional actions which are fundamental to the success of an agency. Practicing ethics also allows limited resources to be utilized in the most efficient manner.

New §276.13 clarifies that an injured employee has a legitimate workers' compensation claim when requesting assistance from OIEC. Texas Labor Code §404.1015 authorizes the public counsel may refuse to provide or may terminate services of the office to any claimant who: is abusive or violent to or who threatens any employee of the office; requests assistance in claiming benefits not provided by law; or commits or threaten to commit a criminal act in pursuit of a workers' compensation claim. If the public counsel determines that the services of the office should be refused or terminated, the office shall inform the affected claimant in writing and notify the division. The office shall notify and cooperate with the appropriate law enforcement authority and the Texas Department of Insurance, Fraud Unit, if the office becomes aware that the claimant or person acting on the claimant's behalf commits or threatens to commit a criminal act.

New §276.13 protects the integrity of the ombudsman program as well as requires ethical behavior between the ombudsman and the injured employee.

Mr. Brian White, Deputy Counsel/Chief of Staff, has determined that for each year of the first five years the proposed section shall be in effect, there shall be no fiscal impact to state and local governments as a result of the enforcement or administration of this rule. There shall be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. White has determined that for each year of the first five years the proposed new section is in effect the public benefit will be a clear understanding of an Ombudsman's role in the workers' compensation system. OIEC's rules will now reflect requirements established by Texas Labor Code §404.1015, which prohibit an Ombudsman from assisting an injured employee with a frivolous claim for income or medical benefits. New §276.13 provides a public benefit to both the agency and taxpayers by ensuring OIEC's limited resources are used efficiently to fulfill the agency's mission to assist, educate, and advocate on behalf of the injured employees of Texas.

OIEC has determined that the proposal will not have an adverse economic effect on small or micro-business.

OIEC has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225 and therefore a regulatory flexibility analysis is not required.

OIEC has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under the Texas Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on June 10, 2011, to Brian White, Deputy Public Counsel/Chief of Staff, Office of Injured Employee Counsel, Mail Code 50, 7551 Metro Center Drive, Austin, Texas 78744. A request for a public hearing should be submitted separately to the Deputy Public Counsel/Chief of Staff.

The new section is proposed pursuant to Texas Labor Code §§404.006, 404.1015 and 404.110. Section 404.006 provides the Public Counsel rulemaking authority to adopt rules. Section 404.1015 provides for refusal to provide or termination of ser-

vices. Section 404.110 provides for the applicability to Public Counsel of confidentiality requirements.

The following sections are affected by this proposal:

Rule: §276.13.

Statute: Texas Labor Code §§404.006, 404.1015 and 404.110.

§276.13. Ombudsman Program Ethics Code of Conduct.

(a) Definition. Groundless--for purposes of this section means no basis in law or fact and not warranted by a good faith argument for the extension, modification, or reversal of existing law.

(b) Office of Injured Employee Counsel Ombudsmen shall adhere to the ethical standards as reflected in Rule 13 of the Texas Rules of Civil Procedure in that groundless factual or legal assertions will not be made. This shall not be construed as a limitation on the ability of Ombudsmen to assist, educate, or advocate on behalf of injured employee in the pursuit of valid claims or issues.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100568
Brian White
Deputy Public Counsel/Chief of Staff
Office of Injured Employee Counsel
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 804-4182

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 51. EXECUTIVE
SUBCHAPTER I. HISTORICALLY UNDERUTILIZED BUSINESSES

31 TAC §51.171

The Texas Parks and Wildlife Department proposes an amendment to §51.171, concerning Historically Underutilized Business Program.

The current rule adopts by reference the provisions of 1 TAC §§111.111 - 111.128, which until recently, set forth the requirements to be followed by state agencies regarding historically underutilized businesses (HUB). Those provisions have been relocated to 34 TAC Chapter 20, Subchapter B, following the statutory reassignment of program oversight to the Comptroller of Public Accounts. The proposed amendment would update the reference and is nonsubstantive.

Mike Jensen, Director of Administrative Resources, has determined that for each year of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state and local governments as a result of enforcing or administering the rule.

Mr. Jensen also has determined that for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be accurate references within department regulations.

There will be no adverse economic effect on persons required to comply with the rule as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. Since the proposed rule does not make substantive changes and is merely for the purpose of ensuring an accurate cross-reference, the department has determined that the proposed amendment will not impose any direct adverse economic effects on small businesses or microbusinesses. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to Julie Horsley, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; telephone: (512) 389-4913; e-mail: julie.horsley@tpwd.state.tx.us.

The amendment is proposed under the authority of Government Code, §2161.003, which requires the commission to adopt rules promulgated by the Comptroller of Public Accounts under Government Code, §2161.0012.

The proposed amendment affects Government Code, Chapter 2161.

§51.171. Historically Underutilized Business Program.

The Texas Parks and Wildlife Commission adopts by reference the provisions of 34 TAC Chapter 20, Subchapter B [~~1 TAC §§111.111-111.128~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100558

Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 389-4775

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CHAPTER 53. FINANCE
SUBCHAPTER I. COMBINATION AND SUPER-COMBINATION LICENSE REVENUE ALLOCATION
31 TAC §53.130

The Texas Parks and Wildlife Department (the department) proposes an amendment to §53.130, concerning Super-Combination License Revenue Allocation.

The proposed amendment would alter the title of the section and implement a new schedule for conducting the surveys used to determine stamp utilization by purchasers of super-combination (hereafter, "supercombo") license packages and shift to use of averages to estimate utilization of each stamp.

Under Parks and Wildlife Code, Chapter 43, no person may fish in saltwater without having purchased a saltwater fishing stamp, no person may fish in public freshwater without having purchased a freshwater fishing stamp, no person may hunt a migratory game bird without having purchased a migratory game bird stamp, no person may hunt an upland game bird without having purchased an upland game bird stamp, and no person may hunt deer, turkey, or javelina during an archery-only season without having purchased an archery stamp.

Under Parks and Wildlife Code, §11.302, all revenue received from the sale of all types of hunting licenses, fishing licenses, and stamps must be placed in the Game, Fish, and Water Safety Account. Parks and Wildlife Code, Chapter 43, further specifies how the department deposits and spends the proceeds from the sale of each type of stamp. Under §43.405, the net receipts from the sale of saltwater fishing stamps shall be spent for coastal fisheries enforcement and management. Under §43.656, the net proceeds from the sale of the migratory game bird stamp may be used only for the management of and research concerning migratory game birds; the acquisition, lease, or development of migratory game bird habitats; contracts, donations, and grants; and only in a manner that addresses the needs of migratory birds in this state. Under §43.658, the net proceeds from the sale of the upland game bird stamp may be used only for the management of and research concerning upland game birds; the acquisition, lease, or development of upland game bird habitats; contracts, donations, and grants; and only in a manner that addresses the needs of upland game birds in this state. Under §43.805, the net receipts from freshwater fishing stamp sales may be spent only for the repair, maintenance, renovation, or replacement of freshwater fish hatcheries in this state; the purchase of game fish that are stocked into the public water of this state; or the restoration, enhancement, or management of freshwater fish habitats. The net proceeds from the archery stamp must be deposited in the Game, Fish, and Water Safety Account and may be spent for any purpose authorized for that account. As a result, the net proceeds from the sale of each stamp, except for the archery stamp, are to be used in a way that is directly related to the type of stamp sold.

Under Parks and Wildlife Code, Chapter 50, all combination licenses must be sold at less than the combined cost of the individual licenses, permits, or stamps included in the package, and the commission is required to allocate net revenue to individual stamp funds for the sale of stamps included in combination license packages according to a methodology that must incorporate the proportionate discounted prices of each stamp and the estimated utilization of each stamp. The super-combination license package is very popular, but because it is required by statute to be discounted, the department must allocate revenue to respective stamp accounts according to a formula.

Under current rule, the department conducts an annual survey of stamp utilization by purchasers of the supercombo licenses, which is used to allocate supercombo revenue to individual stamp funds. Trends show that there is little variation in survey results from year to year. The proposed amendment would eliminate the annual survey requirement and replace it with a requirement for the survey to be conducted at three-year intervals. In addition, the proposed amendment would specify that the calculation would be performed using an average of the survey results from the most recent three, four or five surveys, rather than the survey results from one year only.

Parks and Wildlife Code, Chapter 50 requires the commission to allocate net revenue to individual stamp funds for the sale of stamps included in combination license packages. The current rule addresses only supercombo licenses. The department also sells combination hunting and fishing license packages (a hunting license, a fishing license, and either the saltwater fishing stamp or the freshwater fishing stamp or both). The current rule does not address those packages because the department allocates the full cost of the respective stamp (i.e., saltwater and/or freshwater) to the respective stamp fund on a per-sale basis; however, the proposed amendment would note that allocation for the sake of clarity and compliance with statutory requirements. The proposed amendment also would retitle the section to accurately reflect the contents of the section.

Julie Horsley, Director of Planning and Analysis, has determined that for each year of the first five years that the rule as proposed is in effect, there will be fiscal implications for state government as a result of administering or enforcing the rule. Because the rule replaces the current annual survey with a survey conducted once every three years, the periodicity of fiscal implications to the agency is not annual. The current minimum cost to the department of conducting the annual survey is $13,000. Therefore, implementing a three-year survey cycle will result in a minimum cost savings of $26,000 over a three-year period.

There will be no fiscal implications for other units of state or local government as a result of the proposed rule.

Ms. Horsley also has determined that for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the proper allocation of revenue from the sale of super-combination hunting and fishing license packages to individual stamp accounts.

There will be no adverse economic effect on small businesses, microbusinesses, or persons required to comply with the rule as proposed, as the rule affects only the department.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules) does not apply to the proposed rule.

Comments on the proposed rule may be submitted to Julie Horsley, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; telephone: (512) 389-4913; e-mail: julie.horsley@tpwd.state.tx.us.

The amendment is proposed under Parks and Wildlife Code, §50.002, which authorizes the commission to establish fees for combination licenses.

The proposed amendment affects Parks and Wildlife Code, Chapter 50.

§53.130. Combination and Super-Combination License Package Revenue Allocation.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Gross receipts--the total amount received from the sale of a combination or super-combination license package before any commission or any other collection cost is deducted.

(2) License--the hunting license and fishing license included in a combination or [~~the~~] super-combination license package.

(3) - (5) (No change.)

(6) Stamp--any stamp included in a combination or [~~the~~] super-combination license package.

(7) Super-combination license package [~~(package)~~]--those licenses and stamps listed in §53.3(7) and (8) of this title (relating to Combination Hunting and Fishing License Packages).

(8) Combination license package--those licenses and stamps listed in §53.3(1) - (6) of this title.

(b) Super-Combination License Package.

(1) Net receipts from the sale of a super-combination license package shall be allocated to each license and stamp in the super-combination license package by means of a relative weighting calculated by using both the original price of the licenses and stamps and purchaser utilization, which shall be based on an average of survey results from the most recent three, four or five surveys conducted [~~as established by annual survey~~].

(2) A survey to determine purchaser utilization shall be conducted once every three years.

(c) Combination License Revenue Allocation. Fishing stamps sold as part of a combination license package are not discounted. The full value of each endorsement (100% of the original price of each stamp) sold as part of a combination license package shall be allocated to each endorsement fund.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100559

Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 389-4775

CHAPTER 57. FISHERIES
SUBCHAPTER N. STATEWIDE RECREATIONAL AND COMMERCIAL FISHING PROCLAMATION

The Texas Parks and Wildlife Department proposes amendments to §§57.973, 57.974, 57.981, and 57.992, concerning the Statewide Recreational and Commercial Fishing Proclamation.

The proposed amendment to §57.973, concerning Devices, Means, and Methods, would add Wheeler Branch to the list of reservoirs where means of take is limited to pole-and-line only. Wheeler Branch is a new impoundment. Following initial stocking, restricting methods to pole-and-line only is necessary to allow stocked fish to develop.

The proposed amendment to §57.974, concerning Reservoir Boundaries, would modify the boundary for Toledo Bend Reservoir to facilitate understanding and enforcement of fishing harvest regulations on Texas/Louisiana shared waters. The current definition delineates U.S. Highway 84 as the upper boundary of Toledo Bend Reservoir for purposes of establishing harvest regulations on waters shared by Texas and Louisiana. The current use of a roadway, while convenient, omits a small portion of the reservoir that lies north of U.S. 84. Since the rules apply to all shared waters, the current reservoir boundary description would be altered to include all waters on the Texas/Louisiana border.

The proposed amendment to §57.981, concerning Bag, Possession, and Length Limits, also would establish harvest regulations on Wheeler Branch. Wheeler Branch is a new, 180-acre impoundment in Somervell County that will open for fishing September 1, 2011. As part of the management plan to provide and maintain quality angling, the proposed amendment would implement a 14-21 inch slot length limit for largemouth bass; an 18-inch minimum length limit for smallmouth bass; and a five-fish per day bag limit for black bass (combined) including no more than three smallmouth bass and only one largemouth bass 21 inches or greater.

The proposed amendment to §57.981 also would alter harvest regulations for catfish on Kirby Reservoir (Taylor County) and Lake Palestine (Cherokee, Anderson, Henderson, and Smith counties). Catfish are popular sportfish in both of these reservoirs. However, channel catfish populations in both reservoirs exhibit high abundance but poor size distribution and growth. The proposed amendment would alter the current harvest regulations for blue and channel catfish (12-inch minimum length, 25-fish daily bag limit) by eliminating the minimum length and implementing a 50-fish daily bag limit, of which only five blue and/or channel catfish 20 inches or greater in length could be retained per day. The proposed amendment is necessary to liberalize harvest regulations for small channel catfish to reduce intra-specific competition and improve growth and size distribution, and the restrict the harvest of catfish larger than 20 inches in order to maintain and enhance production of quality size fish.

The proposed amendment to §57.981 also would establish harvest regulations for largemouth and black bass on Lake Kyle in Hays County. Lake Kyle is a 12-acre impoundment of Plum Creek located in the City of Kyle. The lake is within a park that is being developed by the City of Kyle but is not yet open to the public. Restricted public access is anticipated in 2011, with full public access anticipated in July, 2012. The department plans to intensively manage this water body to enhance and protect the largemouth bass population. The proposed amendment would implement a 14-21 inch slot length limit for largemouth bass and a five-fish daily bag limit for black bass (combined), including only one largemouth bass of 21 inches or greater.

The proposed amendment to §57.981 also would alter harvest regulations for largemouth, smallmouth, and spotted bass on Lake Alan Henry in Garza County. Lake Alan Henry is located southeast of Lubbock. The initial stocking of the reservoir consisted of largemouth, spotted, and smallmouth bass. Spotted bass have been successfully established and fish under 18 inches are abundant; however, smallmouth bass have not become established. To allow additional harvest of smaller spotted bass while still protecting larger spotted bass, and to simplify regulations, the proposed amendment would implement a combination regulation of no minimum length limit for largemouth bass or spotted bass; a five-fish daily bag limit; a daily retention limit of no more than two largemouth or spotted bass 18 inches or greater; and a 14-inch minimum length limit and five-fish daily bag limit for smallmouth bass.

The proposed amendment to §57.981 also would standardize harvest regulations on Texas/Louisiana shared waters. Department staff has been in contact with Louisiana Department of Wildlife and Fisheries staff to discuss standardization of harvest regulations on the shared waters of Toledo Bend and Caddo reservoirs and the Sabine River from the Toledo Bend dam downstream to the Interstate Highway 10 bridge in Orange County. The proposed amendments would modify harvest regulations for blue, channel, and flathead catfish, and white and black crappie on all three water bodies; for largemouth and spotted bass, and white bass on Caddo; and for largemouth bass, spotted bass, striped bass, and white bass on the Sabine River. Specific changes to existing harvest regulations on all three water bodies are: for blue and channel catfish: no minimum length limit and a 50-fish (in combination) daily bag, of which only five blue and/or channel catfish 20 inches or greater in length may be retained per day; for flathead catfish: an increase in the daily bag limit from five fish to 10 fish; for white and black crappie: removal of the minimum length limit; and on Toledo Bend only, a decrease in the daily bag limit from 50 to 25 and removal of the winter no-release restriction. On the Sabine River below Toledo Bend Reservoir, current regulations would be modified to mirror harvest regulations for largemouth bass, spotted bass, striped bass, and white bass that are in effect on Toledo Bend Reservoir. On Caddo Lake, the existing daily bag limit for largemouth and spotted bass would be increased to eight, and the 14-18 inch slot length limit for largemouth bass would be modified to allow the harvest of no more than four largemouth bass 18 inches or larger. Also, the existing 10-inch minimum length limit for white bass would be removed. The proposed amendments are intended to maintain quality angling and make compliance and enforcement uniform in both Texas and Louisiana jurisdictions, which should reduce potential angler confusion. The department notes that adoption of the proposed amendments is contingent upon action by the Louisiana Department of Wildlife and Fisheries; should Louisiana fail to implement the same harvest regulations, the regulations currently in effect would remain in effect.

The proposed amendments to §57.981 and §57.992, concerning Bag, Possession, and Length Limits, also would clarify that only natural bait may be used when fishing for red snapper by means of a circle hook and correct typographical errors concerning the minimum length limit for gag grouper and snook. In 2007, the department restricted the means for taking red snapper to pole-and-line angling using only circle hooks. The intent of the proposed amendment was to make state rules consistent with rules in federal waters in order to eliminate the possibility of differential enforcement. Federal rules require circle hooks to be used only when fishing for red snapper with natural bait. The proposed amendments clarify that only natural bait may be used to fish for red snapper with circle hooks.

In 2010 the department restructured hunting and fishing regulations to separate hunting rules from fishing rules and recreational fishing rules from commercial fishing rules. In the process, two typographical errors were introduced, indicating that the minimum length limit for gag grouper is 37 inches and the minimum length limit for snook is 22 inches. The proposed amendments to §57.981 and §57.992 would rectify the errors by reflecting the actual minimum length limit of 22 inches for gag grouper and 24 inches for snook.

Ken Kurzawski, Program Director, Inland Fisheries Division, has determined that for each year of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the rules.

Mr. Kurzawski also has determined that for each year of the first five years that the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the proposed rules will be the dispensation of the agency's statutory duty to protect and conserve the fisheries resources of this state, the duty to equitably distribute opportunity for the enjoyment of those resources among the citizens, and the execution of the commission's policy to maximize recreational opportunity within the precepts of sound biological management practices.

There will be no adverse economic effect on persons required to comply with the rules as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that the proposed rules will not directly affect small businesses and/or micro-businesses. Therefore, the department has not prepared the economic impact statement or regulatory flexibility analysis described in Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposal may be submitted to Ken Kurzawski (Inland Fisheries) at (512) 389-4591, e-mail: ken.kurzawski@tpwd.state.tx.us; Jeremy Leitz (Coastal Fisheries) at (361) 825-3356, e-mail: jeremy.leitz@tpwd.state.tx.us; or Robert Goodrich (Law Enforcement) at (512) 389-4853, e-mail: robert.goodrich@tpwd.state.tx.us. Comments also may be submitted via the department's website at http://www.tpwd.state.tx.us/business/feedback/public_comment/.

DIVISION 1. GENERAL PROVISIONS

31 TAC §57.973, §57.974

The amendments are proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed; and §67.004, which requires the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of non-game fish or wildlife that the department considers necessary to manage the species.

The proposed amendments affect Parks and Wildlife Code, Chapters 61 and 67.

§57.973. Devices, Means and Methods.

(a) (No change.)

(b) Game and non-game fish may be taken by pole and line only in:

(1) - (3) (No change.)

(4) the North Concho River (Tom Green County) from O.C. Fisher Dam to Bell Street Dam; [~~and~~]

(5) the South Concho River (Tom Green County) from Lone Wolf Dam to Bell Street Dam; and[~~.~~]

(6) Wheeler Branch (Somervell County).

(c) - (f) (No change.)

§57.974. Reservoir Boundaries.

Reservoir boundaries for daily bag, possession, and length limits.

(1) - (19) (No change.)

(20) Toledo Bend Reservoir in Newton, Sabine, and Shelby counties comprises all impounded waters of the Sabine River from the Toledo Bend Reservoir Dam upstream to the Texas/Louisiana state line [~~U.S. Highway 84~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100560
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 389-4775

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DIVISION 2. STATEWIDE RECREATIONAL FISHING PROCLAMATION

31 TAC §57.981

The amendment is proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed; and §67.004, which requires the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of non-game fish or wildlife that the department considers necessary to manage the species.

The proposed amendment affects Parks and Wildlife Code, Chapters 61 and 67.

§57.981. Bag, Possession, and Length Limits.

(a) (No change.)

(b) There are no bag, possession, or length limits on game or non-game fish, except as provided in this subchapter.

(1) - (3) (No change.)

(4) Except as provided in subsection (c) of this section, the statewide daily bag and length limits shall be as follows.
Figure: 31 TAC §57.981(b)(4)

(c) Exceptions to statewide daily bag, possession, and length limits shall be as follows:

(1) Freshwater species.
Figure: 31 TAC §57.981(c)(1)

(2) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100561
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 389-4775

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DIVISION 3. STATEWIDE COMMERCIAL FISHING PROCLAMATION

31 TAC §57.992

The amendment is proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed; and §67.004, which requires the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of non-game fish or wildlife that the department considers necessary to manage the species.

The proposed amendment affects Parks and Wildlife Code, Chapters 61 and 67.

§57.992. Bag, Possession, and Length Limits.

(a) (No change.)

(b) There are no bag, possession, or length limits on game or non-game fish, except as otherwise provided in this subchapter.

(1) - (3) (No change.)

(4) The statewide daily bag and length limits for commercial fishing shall be as follows.

Figure: 31 TAC §57.992(b)(4)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100562
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 389-4775

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CHAPTER 58. OYSTERS AND SHRIMP

SUBCHAPTER B. STATEWIDE SHRIMP FISHERY PROCLAMATION

31 TAC §58.160

The Texas Parks and Wildlife Department (the department) proposes an amendment to §58.160, concerning Taking or Attempting to Take Shrimp (Shrimping)--General Rules. The proposed amendment would clarify the provisions governing the retention of finfish and other aquatic life on board a licensed commercial shrimp boat.

Parks and Wildlife Code, §66.016, provides that when commercial fishing plates are on board a vessel, all commercial regulations apply to that vessel and the persons on board. Parks and Wildlife Code, §77.0352(a) provides that aquatic products other than shrimp may be sold by the owner of a licensed commercial shrimp boat or the holder of a commercial shrimp boat captain's license, provided the aquatic products were taken incidental to lawful shrimping. Section 77.0352(e) provides that no person, including a crew member of licensed commercial shrimp boat, may sell the catch of shrimp or other aquatic products.

The current rule allows the retention of a catch of finfish or other aquatic life on board a licensed commercial shrimp boat, provided the weight of that catch does not exceed 50% of the weight of the trawl catch of shrimp and the composition of the catch complies with "the recreational bag limit established for those species." The department has determined that the wording of the current rule does not explicitly identify those persons who are allowed to retain finfish or other aquatic life and creates the possibility for misinterpretation by referring to "recreational" limits and by not explicitly stating that the retention limit applies to the boat and not individually to persons aboard the boat.

The proposed amendment would repeat statutory provisions by explicitly stating that only the owner of the commercial shrimp boat or the holder of a commercial shrimp boat captain's license is authorized to retain a catch of finfish or other aquatic life on board a commercial shrimp boat. The amendment would also clarify that the retention limit is an aggregate limit that applies collectively to all persons authorized to retain finfish and other aquatic life aboard a licensed commercial shrimp boat. Although the current rule states, "On board a licensed commercial shrimp boat a catch of finfish or other aquatic life, in any combination, may be retained...," that statement could be misconstrued to mean that the owner of the boat and each person aboard the boat with a captain's license is entitled to retain finfish or other aquatic life in the amount specified in the rule (50% of the weight of the shrimp catch), since the rule does not identify to whom it applies. The proposed amendment also removes the reference to "recreational limits" and instead states that the composition of the retained catch must comply with the bag limits established by 31 TAC §57.981. Section 57.981 establishes restrictions on the recreational take of finfish and other aquatic life, but by removing the reference to "recreational limit" the department intends to eliminate the potential that the word "recreational" could be interpreted to mean that recreational fishing is permitted aboard a commercial shrimp boat.

Robin Riechers, Coastal Fisheries Division Director, has determined that for each year of the first five years the rule as proposed is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rule.

Mr. Riechers also has determined that for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be rules that are clear and easily understood.

There will be no adverse economic effect on persons required to comply with the rule as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. The department has determined that there will be no direct economic effect on small or micro-businesses or persons required to comply as a result of the proposed rule. Although most owners of a commercial shrimp boat or holders of a commercial shrimp boat captain's license would likely be considered small or micro-businesses, the proposed rule is a clarification that does not alter any existing regulatory provision and therefore would not compel or mandate any action on the part of any entity, including small businesses or microbusinesses. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to Jeremy Leitz, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; telephone: (512) 389-4333; e-mail: jeremy.leitz@tpwd.state.tx.us. Comments also may be submitted via the department's website at http://www.tpwd.state.tx.us/business/feedback/public_comment/.

The amendment is proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed; §67.004, which requires the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species; and §77.007, which authorizes the commission to regulate the catching, possession, purchase, and sale of shrimp.

The proposed amendment affects Parks and Wildlife Code, Chapters 61, 67, and 77.

§58.160. Taking or Attempting to Take Shrimp (Shrimping)--General Rules.

(a) - (f) (No change.)

(g) Other aquatic life taken incidental to legal shrimping operations.

(1) Licensed Commercial Shrimp Boats.

(A) Other aquatic life taken incidental to legal shrimping operations may not be retained except as provided in this section [~~these rules~~].

(B) On board a licensed commercial shrimp boat, a catch of finfish or other aquatic life may be retained in any combination not to exceed 50% by weight of the total weight of the trawl catch of shrimp.

(i) Finfish or other aquatic life may be retained under the provisions of this subparagraph only by:

(I) the holder of the current commercial shrimp boat license for that vessel; and/or

(II) the holder of a current commercial shrimp boat captain's license on board the vessel.

(ii) Finfish or other aquatic life retained under the provisions of this subparagraph must comply with the bag and length limits established for that species under §57.981 of this title (relating to Bag, Possession, and Length Limits), if applicable.

(iii) A catch of finfish or other aquatic life retained under this subparagraph may be shared among persons authorized under clause (i) of this subparagraph to retain finfish or other aquatic life, but no person or persons, singly or in the aggregate, may retain more than 50% by weight of the total trawl catch of shrimp by weight while on board a licensed commercial shrimp boat.

[~~(B) On board a licensed commercial shrimp boat a catch of finfish or other aquatic life, in any combination, may be retained in an amount not to exceed 50% by weight of the total trawl catch of shrimp by weight.~~]

~~(i)~~ ~~Within the provision provided in subparagraph (B) of this paragraph, species regulated by bag and size limits by proclamation of the Parks and Wildlife Commission may not be retained in numbers in excess of the recreational daily bag limit established for those species, and may not be retained in protected length limits established for those species.~~]

(iv) [~~(ii)~~] From May 1 through September 30 of each year, in addition to the provision of this subparagraph [~~(B) of this paragraph~~]:

(I) up to 1,500 live non-game fish, not regulated by bag or size limits, may be retained on board a licensed commercial bait-shrimp boat for bait purposes only; and

(II) up to 3,600 (300 dozen) Atlantic cutlassfish (Trichiurus lepturus) (also known as ribbonfish) may be retained on board a licensed commercial bait-shrimp boat for bait purposes only.

(2) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100563

Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 389-4775

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CHAPTER 65. WILDLIFE
SUBCHAPTER A. STATEWIDE HUNTING PROCLAMATION

The Texas Parks and Wildlife Department (the department) proposes amendments to §65.34, concerning Managed Lands Deer Permits (MLDP)--Mule Deer, and §65.64, concerning Turkey.

The proposed amendment to §65.34 would stipulate that MLDPs for mule deer are valid during the archery-only seasons specified in §65.42(c) as well as during the general season. When the mule deer MLDP program was created in 2005, the department created a period of validity for the permits that was concurrent with the white-tailed deer season. In establishing that period of validity, the department did not intend to prevent the hunting of mule deer by means of archery equipment during the archery-only seasons established under §65.42(c). The proposed amendment would clarify that MLDPs for mule deer are valid during the archery-only open season; however, the means of take is limited to lawful archery equipment.

The proposed amendment to §65.34 also would clarify that a harvest recommendation for mule deer could be restricted to bucks or antlerless deer. The current rule provides that a harvest recommendation specify "a harvest quota for both buck and antlerless mule deer or antlerless mule deer only." The proposed amendment would reword the provision to read "a harvest quota for buck and/or antlerless mule deer." The change is nonsubstantive and is intended to eliminate ambiguity in interpretation.

The proposed amendment to §65.64 would close the season for Eastern Turkey in Cherokee, Delta, Gregg, Hardin, Houston, Hunt, Liberty, Montgomery, Rains, Rusk, San Jacinto, Shelby, Smith, Tyler and Walker counties in response to low population and harvest numbers. Closure is necessary for the resumption and success of stocking efforts, should future habitat conditions allow.

The proposed amendment to §65.64 also would alter the spring season dates for the take of Eastern turkey. The current season runs from April 1 to April 30. The proposed new season would open April 15 and close May 14. The change is intended to prevent harvest until the majority of hens have begun incubating, which is expected to result in higher breeding success and a reduction in accidental harvest of hens. The change will also allow harvest during the second peak in gobbling activity, which is expected to result in greater hunter satisfaction.

The proposed amendment to §65.64 also would alter the bag composition during the spring season for Rio Grande turkey in all counties with a bag limit of four turkeys. The current bag composition for turkey during the spring season is gobblers only. The department has determined that the Rio Grande turkey population in Texas is large and stable. Since bearded hens are estimated to constitute less than 5% of the total hen population, allowing harvest of bearded hens during the spring season would not have a negative impact on the population and would allow for the harvest of surplus hens. Another dimension of the proposed amendment would be to reduce accidental illegal harvest. Under the current bag composition, a hunter who takes a bearded hen by mistake (thinking that because it is bearded, it is a gobbler) has committed an illegal act, albeit by accident. The proposed amendment would have the additional benefit of making such harvest legal.

Clayton Wolf, Wildlife Division Director, has determined that for each year of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rules.

Mr. Wolf also has determined that for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the dispensation of the agency's statutory duty to protect and conserve the wildlife resources of this state, the duty to equitably distribute opportunity for the enjoyment of those resources among the citizens, and the execution of the commission's policy to maximize recreational opportunity within the precepts of sound biological management practices.

There will be no adverse economic effect on persons required to comply with the rules as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small and micro-businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that the proposed rule will not directly affect small businesses or micro-businesses. The proposed amendments to §65.34 and §65.64 affect the regulation of recreational license privileges that allow individual persons to pursue and harvest mule deer and turkey, respectively. The proposed amendments would not directly regulate any business and would not impose recordkeeping or reporting requirements; impose taxes or fees; affect sales, profits, or market competition; or require the purchase or modification of equipment or services by small businesses or microbusinesses. Therefore, the department has not prepared the economic impact statement or regulatory flexibility analysis described in Government Code, Chapter 2006.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

Comments on the proposed rules may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; telephone (512) 389-4775; or e-mail: robert.macdonald@tpwd.state.tx.us.

Comments also may be submitted via the department's website at http://www.tpwd.state.tx.us/business/feedback/public_comment/.

DIVISION 1. GENERAL PROVISIONS

31 TAC §65.34

The amendment is proposed under the authority of Parks and Wildlife Code, Chapter 42, which allows the department to issue tags for animals during each year or season; and Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed.

The proposed amendment affects Parks and Wildlife Code, Chapters 42 and 61.

§65.34. Managed Lands Deer Permits (MLDP)--Mule Deer.

(a) MLDPs for mule deer may be issued only to a landowner who has a current wildlife management plan (WMP) in accordance with subsection (b) of this section that specifies a harvest quota for [~~both~~] buck and/or [~~and~~] antlerless mule deer [~~or antlerless mule deer only~~]. A WMP is not valid unless it is:

(1) consistent with Parks and Wildlife Code, [~~§~~]§61.053 and §61.056; and

(2) (No change.)

(b) (No change.)

(c) An MLDP issued under this section permits the take of antlerless and/or buck mule deer, as specified on the permit. An MLDP issued under this section [~~paragraph~~] is valid:

(1) only on the property for which it is issued (as described in the WMP); [~~and~~]

(2) during the archery-only open season established by §65.42 of this title (relating to Deer); however, the lawful means of take is restricted to lawful archery equipment only; and

(3) [~~(2)~~] from the first Saturday in November through the first Sunday in January, during which time any lawful means may be used.

(d) - (j) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100564
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 389-4775

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DIVISION 2. OPEN SEASONS AND BAG LIMITS

31 TAC §65.64

The amendment is proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed.

The proposed amendment affects Parks and Wildlife Code, Chapter 61.

§65.64. Turkey.

(a) (No change.)

(b) Rio Grande Turkey. The open seasons and bag limits for Rio Grande turkey shall be as follows.

(1) - (2) (No change.)

(3) Spring season and bag limits.

(A) In Archer, Armstrong, Baylor, Bell, Borden, Bosque, Briscoe, Brown, Burnet, Callahan, Carson, Childress, Clay, Coke, Coleman, Collingsworth, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crosby, Dawson, Denton, Dickens, Donley, Eastland, Ector, Ellis, Erath, Fisher, Floyd, Foard, Garza, Glasscock, Gray, Hall, Hamilton, Hardeman, Hartley, Haskell, Hemphill, Hill, Hood, Howard, Hutchinson, Irion, Jack, Johnson, Jones, Kent, King, Knox, Lampasas, Lipscomb, Llano, Lynn, Martin, Mason, McCulloch, McLennan, Menard, Midland, Mills, Mitchell, Montague, Moore, Motley, Nolan, Ochiltree, Oldham, Palo Pinto, Parker, Potter, Randall, Reagan, Roberts, Runnels, San Saba, Schleicher, Scurry, Shackelford, Somervell, Stephens, Sterling, Stonewall, Swisher, Tarrant, Taylor, Throckmorton, Tom Green, Travis, Upton, Ward, Wheeler, Wichita, Wilbarger, Williamson, Wise, and Young counties, there is a spring general open season.

(i) (No change.)

(ii) Bag limit: four turkeys, gobblers or bearded hens [~~only~~].

(B) In Aransas, Atascosa, Bandera, Bee, Bexar, Blanco, Brewster, Brooks, Calhoun, Cameron, Comal, Crockett, DeWitt, Dimmit, Duval, Edwards, Frio, Gillespie, Goliad, Gonzales, Guadalupe, Hays, Hidalgo, Jeff Davis, Jim Hogg, Jim Wells, Karnes, Kendall, Kenedy, Kerr, Kimble, Kinney, Kleberg, LaSalle, Live Oak, Maverick, McMullen, Medina, Nueces, Pecos, Real, Refugio, San Patricio, Starr, Sutton, Terrell, Uvalde, Val Verde, Victoria, Webb, Willacy, Wilson, Zapata, and Zavala counties, there is a spring general open season.

(i) (No change.)

(ii) Bag limit: four turkeys, gobblers or bearded hens [~~only~~].

(C) (No change.)

(4) (No change.)

(c) Eastern turkey. The open seasons and bag limits for Eastern turkey shall be as follows. In Angelina, Bowie, Brazoria,

Camp, Cass, [~~Cherokee, Delta,~~] Fannin, Fort Bend, Franklin, Grayson, [~~Gregg, Hardin,~~] Harrison, Hopkins, [~~Houston, Hunt,~~] Jasper, Lamar, [~~Liberty,~~] Marion, Matagorda, [~~Montgomery,~~] Morris, Nacogdoches, Newton, Panola, Polk, [~~Rains,~~] Red River, [~~Rusk,~~] Sabine, San Augustine, [~~San Jacinto, Shelby, Smith,~~] Titus, Trinity, [~~Tyler,~~] Upshur, [~~Walker,~~] Wharton, and Wood counties, there is a spring season during which both Rio Grande and Eastern turkey may be lawfully hunted.

(1) Open season: from April 15 through May 14 [~~April 1 for 30 consecutive days~~].

(2) - (3) (No change.)

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100565
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 389-4775

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PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

The Texas Water Development Board ("TWDB" or "Board") proposes amending Chapter 363, Financial Assistance Programs, §363.12 and §363.31 in order to require information from an applicant for financial assistance about other sources of funding for the project, and to disapprove a commitment to an applicant for financial assistance if federal funds have been obligated for the same project by USDA-RD.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENTS

The TWDB proposes amendments pertaining to the required information in an application for financial assistance and the TWDB's denial of a commitment to an applicant for financial assistance if federal funds have been obligated for the same project by the United States Department of Agriculture-Rural Development ("USDA-RD").

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS

Section 363.12. General, Legal, and Fiscal Information

The proposed amendment to §363.12 adds to the required information in an application for financial assistance, that if additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other funding source for the project or any aspect of the project, an applicant shall submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests. The TWDB application already requires this information, so the proposed rule documents a current procedure.

Section 363.31. Board Consideration of Application

The proposed amendment to §363.31 provides that if the applicant has received an obligation of federal funds by USDA-RD that would duplicate funding from the Board for the same project, as evidenced in writing from the USDA-RD, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the Board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the Board. The executive administrator may submit an application to the Board for a project that is jointly funded with the Board's funds and by federal funds by USDA-RD, provided that the Board's funding will not result in the de-obligation of federal funds with USDA-RD. The purpose of this amendment is to avoid an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration. The rulemaking will prohibit applicants from obtaining funding commitments from both the TWDB and the USDA-RD for the same project, which will limit an applicant's ability to wait until it is ready to close the funding before it chooses the funding source. However, the applicant still has the ability to choose the funding source prior to applying for a commitment. Also, the rulemaking will benefit state and local governments because it will prevent an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for local entities that apply for financial assistance because, although the rulemaking adds required information with an application, the TWDB application already requires this information, so the proposed rule documents a current procedure. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

PUBLIC BENEFITS AND COSTS

Ms. Callahan also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking because it will prevent an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

LOCAL EMPLOYMENT IMPACT STATEMENT

The Board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The Board also has de-

termined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The Board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY ANALYSIS

The Board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT

The Board has determined that the promulgation and enforcement of this proposed rule will constitute neither a statutory nor a constitutional taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed rule does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

SUBMITTAL OF COMMENTS

Comments on the proposed rulemaking will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 463-5580.

DIVISION 2. GENERAL APPLICATION PROCEDURES

31 TAC §363.12

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board, §6.194, which authorizes the Board to adopt rules governing its actions regarding applications, and §§15.102, 15.603, 15.604, 15.605, 15.958, 15.977, and 15.995 which authorize the Board to adopt rules regarding the financial assistance programs affected by this rulemaking.

§363.12. General, Legal, and Fiscal Information.

An application will be in the form and in numbers prescribed by the executive administrator. The executive administrator may request any additional information needed to evaluate the application, and may return any incomplete applications. The following are required to be considered an administratively complete application:

(1) (No change.)

(2) The following information is required on all applications to the board for financial assistance.

(A) - (D) (No change.)

(E) Funding from other sources. If additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other source for the project or any aspect of the project, an applicant shall submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests.

(F) [~~(E)~~] Additional application information. An applicant shall submit any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100604
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 463-8061

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DIVISION 3. FORMAL ACTION BY THE BOARD

31 TAC §363.31

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board, §6.194, which authorizes the Board to adopt rules governing its actions regarding applications, and §§15.102, 15.603, 15.604, 15.605, 15.958, 15.977, and 15.995 which authorize the Board to adopt rules regarding the financial assistance programs affected by this rulemaking.

§363.31. Board Consideration of Application.

The executive administrator shall submit the application to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified of the time and place of such meeting. If the applicant has received an obligation of federal funds by the United States Department of Agriculture-Rural Development that would duplicate funding from the board for the same project, as evidenced in writing from the United States Department of Agriculture-Rural Development, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100605
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 463-8061

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CHAPTER 371. DRINKING WATER STATE REVOLVING FUND
SUBCHAPTER D. APPLICATION FOR ASSISTANCE

31 TAC §371.31, §371.32

The Texas Water Development Board ("TWDB" or "Board") proposes amending Chapter 371, Drinking Water State Revolving Fund, §371.31 and §371.32 in order to require information from an applicant for financial assistance about other sources of funding for the project, and to disapprove a commitment to an applicant for financial assistance if federal funds have been obligated for the same project by USDA-RD.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENTS

The TWDB proposes amendments pertaining to the required information in an application for financial assistance and the TWDB's denial of a commitment to an applicant for financial assistance if federal funds have been obligated for the same project by the United States Department of Agriculture-Rural Development ("USDA-RD").

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS

Section 371.31. Timeliness of Application and Required Application Information

The proposed amendment to §371.31 adds to the required information in an application for financial assistance, that if additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other funding source for the project or any aspect of the project, an applicant shall submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests. The TWDB application already requires this information, so the proposed rule documents a current procedure.

Section 371.32. Review of Applications for Financial Assistance

The proposed amendment to §371.32 provides that if the applicant has received an obligation of federal funds by USDA-RD that would duplicate funding from the Board for the same project, as evidenced in writing from the USDA-RD, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the Board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the Board. The executive administrator may submit an application to the Board for a project that is jointly funded with the Board's funds and by federal funds by USDA-RD, provided that the Board's funding will not result in the de-obligation of federal funds with USDA-RD. The purpose of this amendment is to avoid an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration. The rulemaking will prohibit applicants from obtaining funding commitments from both the TWDB and the USDA-RD for the same project, which will limit an applicant's ability to wait until it is ready to close the funding before it chooses the funding source. However, the applicant still has the ability to choose the funding source prior to applying for a commitment. Also, the rulemaking will benefit state and local governments because it will prevent an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for local entities that apply for financial assistance because, although the rulemaking adds required information with an application, the TWDB application already requires this information, so the proposed rule documents a current procedure. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

PUBLIC BENEFITS AND COSTS

Ms. Callahan also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking because it will prevent an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

LOCAL EMPLOYMENT IMPACT STATEMENT

The Board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The Board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The Board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY ANALYSIS

The Board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT

The Board has determined that the promulgation and enforcement of this proposed rule will constitute neither a statutory nor a constitutional taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed rule does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

SUBMITTAL OF COMMENTS

Comments on the proposed rulemaking will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development

Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 463-5580.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board, §6.194, which authorizes the Board to adopt rules governing its actions regarding applications, and §§15.102, 15.603, 15.604, 15.605, 15.958, 15.977, and 15.995 which authorize the Board to adopt rules regarding the financial assistance programs affected by this rulemaking.

§371.31. Timeliness of Application and Required Application Information.

(a) - (b) (No change.)

(c) For eligible private Applicants and eligible NPNC Applicants that are not also eligible public Applicants, an application shall be in the form and numbers prescribed by the executive administrator, and, in addition to any other information that may be required by the executive administrator or the Board, such Applicant shall provide:

(1) - (11) (No change.)

(12) if the Applicant is required to utilize a surcharge or otherwise intends to rely on an increase in the rate that it is charging in order to repay the requested financial assistance, a copy of the acknowledgment from the commission that the proposed rate change filing has been received; [~~and~~]

(13) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant; and[~~.~~]

(14) if additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other source for the project or any aspect of the project, a listing of those sources, including total project costs, financing terms, and current status of the funding requests.

§371.32. Review of Applications for Financial Assistance.

(a) - (b) (No change.)

(c) If the applicant has received an obligation of federal funds by the United States Department of Agriculture-Rural Development that would duplicate funding from the board for the same project, as evidenced in writing from the United States Department of Agriculture-Rural Development, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100606
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 463-8061

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CHAPTER 375. CLEAN WATER STATE REVOLVING FUND
SUBCHAPTER D. APPLICATION FOR ASSISTANCE

31 TAC §375.41, §375.42

The Texas Water Development Board ("TWDB" or "Board") proposes amending Chapter 375, Clean Water State Revolving Fund, §375.41 and §375.42 in order to require information from an applicant for financial assistance about other sources of funding for the project, and to disapprove a commitment to an applicant for financial assistance if federal funds have been obligated for the same project by USDA-RD.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENTS

The TWDB proposes amendments pertaining to the required information in an application for financial assistance and the TWDB's denial of a commitment to an applicant for financial assistance if federal funds have been obligated for the same project by the United States Department of Agriculture-Rural Development ("USDA-RD").

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS

Section 375.41. Timeliness of Application and Required Application Information

The proposed amendment to §375.41 adds to the required information in an application for financial assistance, that if additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other funding source for the project or any aspect of the project, an applicant shall submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests. The TWDB application already requires this information, so the proposed rule documents a current procedure.

Section 375.42. Review of Applications

The proposed amendment to §375.42 provides that if the applicant has received an obligation of federal funds by USDA-RD that would duplicate funding from the Board for the same project, as evidenced in writing from the USDA-RD, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the Board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the Board. The executive administrator may submit an application to the Board for a project that is jointly funded with the Board's funds and by federal funds by USDA-RD, provided that the Board's funding will not result in the de-obligation of federal funds with USDA-RD. The purpose of this amendment is to avoid an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administra-

tion. The rulemaking will prohibit applicants from obtaining funding commitments from both the TWDB and the USDA-RD for the same project, which will limit an applicant's ability to wait until it is ready to close the funding before it chooses the funding source. However, the applicant still has the ability to choose the funding source prior to applying for a commitment. Also, the rulemaking will benefit state and local governments because it will prevent an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for local entities that apply for financial assistance because, although the rulemaking adds required information with an application, the TWDB application already requires this information, so the proposed rule documents a current procedure. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

PUBLIC BENEFITS AND COSTS

Ms. Callahan also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking because it will prevent an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

LOCAL EMPLOYMENT IMPACT STATEMENT

The Board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The Board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The Board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY ANALYSIS

The Board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT

The Board has determined that the promulgation and enforcement of this proposed rule will constitute neither a statutory nor a constitutional taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed rule does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

SUBMITTAL OF COMMENTS

Comments on the proposed rulemaking will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 463-5580.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board, §6.194, which authorizes the Board to adopt rules governing its actions regarding applications, and §§15.102, 15.603, 15.604, 15.605, 15.958, 15.977, and 15.995 which authorize the Board to adopt rules regarding the financial assistance programs affected by this rulemaking.

§375.41. Timeliness of Application and Required Application Information.

(a) (No change.)

(b) Required Application Information. An application shall be in the form and numbers prescribed by the executive administrator and, in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide at a minimum, the following documentation:

(1) - (9) (No change.)

(10) if financing of the project requires the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts under which Applicant's gross income is expected to accrue. Before a loan is closed, an Applicant shall submit executed copies of such contracts to the executive administrator; [~~and~~]

(11) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant; and[~~.~~]

(12) if additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other source for the project or any aspect of the project, a listing of those sources, including total project costs, financing terms, and current status of the funding requests.

§375.42. Review of Applications.

(a) - (b) (No change.)

(c) If the applicant has received an obligation of federal funds by the United States Department of Agriculture-Rural Development that would duplicate funding from the board for the same project, as evidenced in writing from the United States Department of Agriculture-Rural Development, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100607
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 463-8061

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CHAPTER 384. RURAL WATER ASSISTANCE FUND

SUBCHAPTER B. APPLICATION PROCEDURES

31 TAC §384.22, §384.24

The Texas Water Development Board ("TWDB" or "Board") proposes amending Chapter 384, Rural Water Assistance Fund, §384.22 and §384.24, in order to require information from an applicant for financial assistance about other sources of funding for the project, and to disapprove a commitment to an applicant for financial assistance if federal funds have been obligated for the same project by USDA-RD.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENTS

The TWDB proposes amendments pertaining to the required information in an application for financial assistance and the TWDB's denial of a commitment to an applicant for financial assistance if federal funds have been obligated for the same project by the United States Department of Agriculture-Rural Development ("USDA-RD").

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS

Section 384.22. Application for Assistance

The proposed amendment to §384.22 adds to the required information in an application for financial assistance, that if additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other funding source for the project or any aspect of the project, an applicant shall submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests. The TWDB application already requires this information, so the proposed rule documents a current procedure.

Section 384.24. Board Consideration of Application

The proposed amendment to §384.24 provides that if the applicant has received an obligation of federal funds by USDA-RD that would duplicate funding from the Board for the same project, as evidenced in writing from the USDA-RD, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the Board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the Board. The executive administrator may submit an application to the Board for a project that is jointly funded with the Board's funds and by federal funds by USDA-RD, provided that the Board's funding will not result in the de-obligation of federal funds with USDA-RD. The purpose of this amendment is to avoid an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Melanie Callahan, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration. The rulemaking will prohibit applicants from obtaining funding commitments from both the TWDB and the USDA-RD for the same project, which will limit an applicant's ability to wait until it is ready to close the funding before it chooses the funding source. However, the applicant still has the ability to choose the funding source prior to applying for a commitment. Also, the rulemaking will benefit state and local governments because it will prevent an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for local entities that apply for financial assistance because, although the rulemaking adds required information with an application, the TWDB application already requires this information, so the proposed rule documents a current procedure. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

PUBLIC BENEFITS AND COSTS

Ms. Callahan also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking because it will prevent an applicant's cancellation of its obligation from USDA-RD and the de-obligation of federal funds such that those federal funds cannot be used by USDA-RD on other projects in Texas.

LOCAL EMPLOYMENT IMPACT STATEMENT

The Board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The Board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The Board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY ANALYSIS

The Board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT

The Board has determined that the promulgation and enforcement of this proposed rule will constitute neither a statutory nor a constitutional taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed rule does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

SUBMITTAL OF COMMENTS

Comments on the proposed rulemaking will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development

Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 463-5580.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Water Code §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board, §6.194, which authorizes the Board to adopt rules governing its actions regarding applications, and §§15.102, 15.603, 15.604, 15.605, 15.958, 15.977, and 15.995 which authorize the Board to adopt rules regarding the financial assistance programs affected by this rulemaking.

§384.22. Application for Assistance.

(a) (No change.)

(b) The following information is required on all applications to the board for financial assistance.

(1) - (4) (No change.)

(5) Funding from other sources. If additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other funding agency for the project or any aspect of the project, an applicant shall submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests.

(6) [~~(5)~~] Additional application information. An applicant shall submit any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

§384.24. Board Consideration of Application.

(a) The executive administrator shall submit the application to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified of the time and place of such meeting. If the applicant has received an obligation of federal funds by the United States Department of Agriculture-Rural Development that would duplicate funding from the board for the same project, as evidenced in writing from the United States Department of Agriculture-Rural Development, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the board.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100608
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 463-8061

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 20. TEXAS PROCUREMENT AND SUPPORT SERVICES

SUBCHAPTER B. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

34 TAC §§20.10 - 20.12, 20.23

The Comptroller of Public Accounts proposes new §20.10, concerning policy and purpose; §20.11, concerning definitions; §20.12, concerning evaluation of active participation in the control, operation, and management of entities; and §20.23, concerning graduation procedures to 34 TAC Chapter 20, Subchapter B, Historically Underutilized Business Program. These new sections are proposed primarily to implement the findings and recommendations of the Disparity Study of State Contracting, released March 30, 2010 ("the Disparity Study"), available at: http://www.window.state.tx.us/procurement/prog/hub/disparity/.

Pursuant to the U.S. Supreme Court ruling in City of Richmond v. J.A. Croson, 488 U.S. 469, and cases that flow from that decision, governmental entities must demonstrate that disparity exists in contractor utilization in order to justify implementing or continuing a race-conscious contracting program. See Chapter 2 of the Disparity Study for more discussion and detail of the legal requirements underlying the HUB program. Adoption of these proposed rules will ensure the continued legal compliance of the HUB program through the adoption of HUB utilization targets that are based upon the most recent defensible evidence of contractor utilization disparity.

Section 20.10 contains the language of the repealed §20.11. It is proposed as §20.10 with changes to the original wording to clarify the language, to delete or update obsolete references, or to reflect current practices and program structures.

Section 20.11 contains the definitions formerly set forth in the repealed §20.12, which is repealed in its current form and readopted as new §20.11. New §20.11 contains new definitions for the terms "HUB Business Plan", "HUB Subcontracting Plan", "Owner or Qualifying Owner", "Resident of the State of Texas", "SBA", "Work", and "Working Day." Further, the section contains substantively revised definitions of "Contractor", "Historically Underutilized Business", "Historically Underutilized Business (HUB) Coordinator", "Non-treasury Funds", "Principle Place of Business", "Term Contract", and "Treasury Funds." These changes are focused on clarifying and updating these definitions and ensuring they meet the program objectives.

Section 20.12 proposes new language which gives a list of factors that may be considered by the comptroller's office when evaluating the extent of participation by HUB-qualified individuals in business enterprises applying for HUB status or renewal.

Section 20.23 is technically "new" for rule publication purposes, it revives a concept that existed in the program from its inception through 2001. This section proposes to reinstitute a procedure whereby HUBs are "graduated" from the HUB program when they reach a size that is no longer considered a "small business" pursuant to the published U.S. Small Business Administration (SBA) size standards. The rule requires the comptroller to review the size standards annually to determine they are still an appropriate measure for graduation from the program. The

proposed rule would allow a HUB to reapply for HUB certification after they are graduated pursuant to the rule once they can prove they meet all of the rule criteria for certification.

In implementing this new section, CPA intends to allow agencies to receive continuing HUB credit for utilization of any business that was a HUB at the inception of the contract, through the end of the fiscal year in which the HUB is graduated or otherwise loses their HUB certification. This is consistent with current practices when a HUB loses certification for some reason.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rules will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rule will be by clarifying for potential HUB applicants and currently registered HUBs the criteria for becoming and remaining a HUB; and continuing the HUB program in compliance with existing legal requirements. The proposed rules would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rules.

Comments on the new sections may be submitted to David Duncan, Deputy General Counsel, P.O. Box 13186, Austin, Texas 78711-3186, or e-mail comments to: david.duncan@cpa.state.tx.us. Public hearings will be held at the following locations and dates:

McAllen

Thursday, March 3, 2011 2:00 p.m. - 5:00 p.m. at the Texas Department of Transportation Regional Office, VTC Conference Room, 600 West Expressway U.S. 83, Pharr, Texas 78577.

Houston

Wednesday, March 9, 2011 6:00 p.m. - 8:00 p.m. at Texas Southern University, Thurgood Marshall School of Law, Moot Court Room 105, corner of Wheeler Street and Cobb Street, Houston, Texas 77004.

Austin

Thursday, March 17, 2011 1:30 p.m. - 4:00 p.m. at the Central Services Building, Room 402, 1711 San Jacinto Street, Austin, Texas 78701.

Dallas

Thursday, March 24, 2011 6:00 p.m. - 8:00 p.m. at the J. Erik Jonsson Central Library, O'Hara Room (7th Floor) 1515 Young Street, Dallas, Texas 75202.

The new sections are proposed under the authority of Government Code, Chapter 2161, which provides in §2161.0012 authority for the comptroller to adopt rules as necessary to efficiently and effectively administer the state's HUB program. Additionally, §2161.002(c) requires that the comptroller adopt rules as necessary to respond to the findings of the updated Disparity Study performed on behalf of the state.

The new sections implement Government Code, §§2161.0011, 2161.0012, 2161.002, 2161.0015, 2161.004, 2161.061, 2161.062, 2161.065, 2161.181, and 2161.252.

§20.10. Policy and Purpose.

It is the policy of the comptroller to encourage the use of historically underutilized businesses (HUBs) by state agencies and to assist agencies in the implementation of this policy through race, ethnic, and gender-neutral means. The purpose of the HUB program is to promote full and equal business opportunities for all businesses in an effort to remedy disparity in state procurement and contracting in accordance with the HUB goals specified in the State of Texas Disparity Study. This subchapter (relating to the Historically Underutilized Business Program) describes the minimum steps and requirements to be undertaken by the comptroller and state agencies to fulfill the state's HUB policy and attain aspirational goals recommended by the Texas Disparity Study.

§20.11. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Applicant--A corporation, sole-proprietorship, partnership, joint venture, limited liability company, or supplier that applies to the comptroller for certification as an historically underutilized business.

(2) Application--The comptroller's form for applicants to request certification as an historically underutilized business.

(3) Commodities--Any tangible good provided by a contractor to the state.

(4) Comptroller--The office of the Texas Comptroller of Public Accounts.

(5) Contractor--Any vendor or supplier of commodities or services to a state agency under a purchase order contract or other state contract. A prime contractor is the lead contractor under a state contract.

(6) Directory--The Texas Certified Historically Underutilized Business Directory.

(7) Disparity study--The State of Texas Disparity Study - 2009, conducted by MGT of America, Inc., dated March 30, 2010.

(8) Economically disadvantaged person--An eligible HUB owner (as defined in paragraph (19) of this section) whose business has not exceeded the graduation size standards according to the comptroller's graduation procedures in §20.23 of this title (relating to Graduation Procedures).

(9) Forum--A collaborative effort between agencies and potential contractors to provide information and training regarding an agency's procurement opportunities.

(10) Graduation--When a certified HUB exceeds the comptroller's size standard for HUB certification.

(11) Historically Underutilized Business (HUB)--A business outlined in subparagraphs (A) - (F) of this paragraph that is certified by the State of Texas and has not exceeded the size standards established by §20.23 of this title with its principal place of business in Texas (as defined in paragraph (21) of this section):

(A) a corporation formed for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities are owned by one or more persons described by paragraph (19)(C) of this section;

(B) a sole proprietorship created for the purpose of making a profit that is 100% owned, operated, and controlled by a person described by paragraph (19)(C) of this section;

(C) a partnership formed for the purpose of making a profit in which 51% of the assets and interest in the partnership is owned

by one or more persons who are described by paragraph (19)(C) of this section;

(D) a joint venture in which each entity in the joint venture is a HUB under this paragraph;

(E) a supplier contract between a HUB under this paragraph and a prime contractor under which the HUB is directly involved in the manufacture or distribution of the supplies or materials or otherwise warehouses and ships the supplies; or

(F) a business other than described in subparagraphs (B), (D), and (E) of this paragraph, which is formed for the purpose of making a profit and is otherwise a legally recognized business organization under the laws of the State of Texas, provided that at least 51% of the assets and 51% of any classes of stock and equitable securities are owned by one or more persons described by paragraph (19)(C) of this section.

(12) Historically Underutilized Business (HUB) coordinator--The staff member designated by state agencies with more than $10 million in biennial budget. The position of coordinator must be at least equal to the procurement director or may be the procurement director.

(13) HUB report--A fiscal year semi-annual and annual report of the state's total expenditures, contract awards and payments made to certified HUBs.

(14) HUB business plan--A written plan developed by state agencies for increasing HUB utilization required as part of the agency's strategic plan, as required by Government Code, §2161.123.

(15) HUB subcontracting plan--Written documentation regarding the use of subcontractors, which is required to be submitted with all responses to state agency contracts with an expected value of $100,000 or more where subcontracting opportunities have been determined by the state agency to be probable. The HUB subcontracting plan subsequently becomes a provision of the awarded contract, and shall be monitored for compliance by the state agency during the term of the contract.

(16) Mentor-Protégé Program--A program designed by the comptroller to assist agencies in identifying prime contractors and HUBs to foster long term relationships and for potential long-term contractual relationships. Each agency required to have a HUB coordinator is required to implement the Mentor-Protégé Program in accordance with §20.28 of this title (relating to Mentor-Protégé Program).

(17) Non-treasury funds--Funds that are not state funds subject to the custody and control of the comptroller and available for appropriation by the legislature.

(18) Other services--All services other than construction and professional services, including consulting services subject to Government Code, Chapter 2254, Subchapter B.

(19) Owner or qualifying owner--A natural person or persons who:

(A) are residents of the state of Texas as that term is defined in paragraph (23) of this section;

(B) have a proportionate interest and demonstrate active participation in the control, operation, and management of the entities' affairs; and

(C) are economically disadvantaged because of their identification as members of the following groups:

(i) Black Americans--which includes persons having origins in any of the Black racial groups of Africa;

(ii) Hispanic Americans--which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) American Women--which includes all women of any ethnicity except those specified in clauses (i), (ii), (iv), and (v) of this subparagraph;

(iv) Asian Pacific Americans--which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, the Northern Marianas, and Subcontinent Asian Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Sri Lanka, Bhutan or Nepal; and

(v) Native Americans--which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians.

(20) Person or natural person--A human being who is a U.S. citizen, born or naturalized.

(21) Principal place of business--The location where the qualifying owner or owners (as defined in paragraph (19) of this section) of the business direct, control, and coordinate the business's daily operations and activities.

(22) Professional services--Services of certain licensed or registered professions that must be purchased by state agencies under Government Code, Chapter 2254, Subchapter A.

(23) Resident of the State of Texas--Qualifying owners are considered residents of the state if the owners:

(A) physically reside in the state for a period of not less than 12 consecutive months prior to submitting an application for HUB certification, and list Texas as their residency in their most recent tax return submitted to the U.S. Internal Revenue Service; or

(B) have established, to the satisfaction of the comptroller, a Texas domicile for a period of time sufficient to demonstrate their intention to permanently reside in the state consistently over a substantial period of time.

(24) Respondent--A person that submits a response.

(25) Response--A submission made in answer to an invitation for bid, request for proposal, or other purchase solicitation document, which may take the form of a bid, proposal, offer or other applicable expression of interest.

(26) SBA--The U.S. Small Business Administration.

(27) Subcontractor--As defined by Government Code, §2251.001, this is a person who contracts with a prime contractor to work or contribute toward completing work for a governmental entity.

(28) Subcontractor funds--Payments made to any subcontractor by a prime contractor or supplier under contract with the state.

(29) Size standards--Graduation thresholds established by the HUB program consistent with the comptroller's rules which are based on the U.S. Small Business Administration's size standards, and based on the North American Industry Classification System codes. These may also be used to determine eligibility for HUB registration.

(30) Term contract--A statewide contract established by the comptroller as a supply source for user entities for specific commodities or services.

(31) Treasury funds--State funds subject to the custody and control of the comptroller and available for appropriation by the legislature.

(32) USAS--Uniform Statewide Accounting System for the State of Texas.

(33) Vendor Identification Number (VID)--A 13-digit identification number used in state government to identify the bidder or business for payment or award of contracts, certification as a HUB, and registration on the bidders list.

(34) Work--Providing goods or performing services on behalf of a governmental entity pursuant to a contract.

(35) Working day--Normal business day of a state agency, not including weekends, federal or state holidays, or days the agency is declared closed by its executive officer.

§20.12. Evaluation of Active Participation in the Control, Operation, and Management of Entities.

(a) In determining the extent of "active participation in the control, operation and management" necessary for qualification as a HUB, the comptroller may consider all relevant evidence. In considering and applying the factors in paragraphs (1) - (10) of this subsection, the comptroller will consider actual roles and responsibilities of the eligible owners, rather than titles or statements of intention regarding the owners' role. Factors which may be considered include, but are not limited to:

(1) appearance and relative scope of responsibility of HUB-eligible owners in articles of incorporation or partnership formation documents;

(2) duties and rights of shareholders or partners relative to operational decisions affecting the short term and long term goals of the business;

(3) any restrictive language in articles of incorporation or partnership agreements applicable to HUB eligible owner;

(4) whether any licenses, certificates, or permits required to operate the business are held by or in the name of the HUB eligible owner, and whether the eligible owner is qualified to hold such licenses or permits pursuant to applicable laws and regulations;

(5) the percentage of profit and/or risk available to the HUB eligible owner under the corporate or partnership agreements;

(6) ability of other owners or partners to dilute either the ownership percentage or operational powers of the HUB eligible owner;

(7) whether the HUB eligible owner has full time employment elsewhere that might conflict with full participation in operation of the business;

(8) the percentage of government versus non-government contracts performed by the business where the HUB eligible owner actively participates in the bidding of the contract or the performance of the work;

(9) the period of time a HUB eligible owner participated in the active management and operation of the business prior to the business seeking HUB status; and

(10) whether and to what extent the HUB business shares management, board members, partners, employees, or other resources with another business in amounts or ways which might indicate that they are related or affiliated businesses.

(b) The comptroller may request any additional information it considers necessary to evaluate any or all of the factors in subsection (a)(1) - (10) of this section prior to a decision to certify an applicant as a HUB.

§20.23. Graduation Procedures.

(a) A HUB shall be graduated from being used to fulfill HUB procurement utilization goals when it has maintained gross receipts or total employment levels during four consecutive years which exceed the SBA size standards set forth in 13 CFR, §121.201 for the following categories:

(1) heavy construction other than building construction;

(2) building construction, including general contractors and operative builders;

(3) special trade construction;

(4) medical, financial, and accounting services;

(5) architectural, engineering and surveying services;

(6) other services including legal services;

(7) commodities wholesale; and

(8) commodities manufacturers.

(b) Firms that achieve the size standards identified in subsection (a) of this section will be assumed to have reached a competitive status in overcoming the effects of discrimination. The comptroller shall review, as part of the certification or recertification process, the financial revenue or relevant data of firms to determine whether the size standards identified in subsection (a) of this section have been achieved.

(c) Businesses that have graduated from the HUB program in accordance with this section, or that have been decertified in accordance with §§20.17 - 20.22 of this title, may not be included in meeting agency HUB goals.

(d) The comptroller shall review the SBA size standards each fiscal year to determine the need to reassess HUB graduation size standards and make any appropriate changes needed.

(e) A HUB that has graduated pursuant to this section or does not qualify as a HUB under §20.11(11) and (19) of this title (relating to Definitions), shall be eligible to reapply for HUB certification only after demonstrating that they meet the qualifications for HUB, including the graduation size standards.

(f) If a HUB is mentoring two or more protégé businesses when it reaches the graduation size standards set forth in subsection (a) of this section, it may petition the director of the TPASS division of the comptroller for a one-year extension of HUB status. The granting of such extension shall be solely at the discretion of the director.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100595
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 475-0387

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34 TAC §20.11, §20.12

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the

Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Comptroller of Public Accounts proposes to repeal the current versions of §20.11, concerning policy and purpose; and §20.12, concerning definitions. The repeals are necessary in order to readopt as new sections of 34 TAC Chapter 20, Subchapter B.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the repeals will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be by providing for improved administration of the HUB program. The proposed repeals would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed repeals.

Comments on the proposed repeals may be submitted to David Duncan, Deputy General Counsel, P.O. Box 13186, Austin, Texas 78711-3186, or e-mail comments to: david.duncan@cpa.state.tx.us. Public hearings will be held at the following locations and dates:

McAllen

Thursday, March 3, 2011 2:00 p.m. - 5:00 p.m. at the Texas Department of Transportation Regional Office, VTC Conference Room, 600 West Expressway U.S. 83, Pharr, Texas 78577.

Houston

Wednesday, March 9, 2011 6:00 p.m. - 8:00 p.m. at Texas Southern University, Thurgood Marshall School of Law, Moot Court Room 105, corner of Wheeler Street and Cobb Street, Houston, Texas 77004.

Austin

Thursday, March 17, 2011 1:30 p.m. - 4:00 p.m. at the Central Services Building, Room 402, 1711 San Jacinto Street, Austin, Texas 78701.

Dallas

Thursday, March 24, 2011 6:00 p.m. - 8:00 p.m. at the J. Erik Jonsson Central Library, O'Hara Room (7th Floor) 1515 Young Street, Dallas, Texas 75202.

The repeals are proposed under the authority of Government Code, Chapter 2161, which provides in §2161.0012 authority for the comptroller to adopt rules as necessary to efficiently and effectively administer the state's HUB program. Additionally, §2161.002(c) requires that the comptroller adopt rules as necessary to respond to the findings of the updated Disparity Study performed on behalf of the state.

The repeals implement Government Code, §§2161.0011, 2161.0012, 2161.002, 2161.004, 2161.061, 2161.062, and 2161.181.

§20.11. Policy and Purpose.
§20.12. Definitions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100594
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 475-0387

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34 TAC §§20.13 - 20.22, 20.24 - 20.28

The Comptroller of Public Accounts proposes to amend §§20.13 - 20.22 and §§20.24 - 20.28 of 34 TAC Chapter 20, Subchapter B, concerning Historically Underutilized Business Program. These changes are proposed primarily to implement the findings and recommendations of the Disparity Study of State Contracting, released March 30, 2010 ("the Disparity Study"), available at: http://www.window.state.tx.us/procurement/prog/hub/disparity/.

Pursuant to the U.S. Supreme Court ruling in City of Richmond v. J.A. Croson, 488 U.S. 469, and cases that flow from that decision, governmental entities must demonstrate that disparity exists in contractor utilization in order to justify implementing or continuing a race-conscious contracting program. See Chapter 2 of the Disparity Study for more discussion and detail of the legal requirements underlying the HUB program. Adoption of these proposed rules will ensure the continued legal compliance of the HUB program through the adoption of HUB utilization targets that are based upon the most recent defensible evidence of contractor utilization disparity.

Section 20.13 adopts the new HUB utilization standards developed through the Disparity Study. The section also contains revised language requiring state agencies to develop plans to increase HUB utilization, including adopting their own agency-specific HUB utilization goals. Additional changes are made to clarify the rule, to delete or update obsolete references, or to reflect current practices and program structures.

The language of §20.14 proposes to streamline factors for agencies' consideration of HUB subcontracts and vendor-submissions of HUB subcontracting plans (HSPs). Rather than specifying different criteria for HSPs for different types of contracts, the language now puts all contracts under the same requirements. The changes also allow agencies to determine that only a portion of a contract has probable subcontracting opportunities, and allows agencies to receive clarifications or corrections to minor deficiencies in submitted HUB subcontracting plans. Additional changes are made to clarify the rule, to delete or update obsolete references, or to reflect current practices and program structures.

Section 20.15 and §20.16 are amended to clarify the rules, to delete or update obsolete references, and to reflect current practices and program structures.

Language in §20.17(a) that was redundant of statute has been removed and replaced with wording explaining the obligation of HUB applicants to prove their Texas residency. Additional changes are made to clarify the rule, to delete or update obsolete references, or to reflect current practices and program structures.

Sections 20.18 - 20.20 are amended to clarify the rules, to delete or update obsolete references, and to reflect current practices and program structures.

Section 20.21 is amended to add a cross-reference to new §20.12, discussed previously, to note the applicability of that new section to determinations of the level of participation and control shown by an eligible owner in the critical areas of business operation. This section is also amended to clarify the rules, to delete or update obsolete references, and to reflect current practices and program structures.

Section 20.22 is amended to clarify the rules, to delete or update obsolete references, and to reflect current practices and program structures.

Sections 20.24 - 20.27 are amended to clarify the rules, to delete or update obsolete references, and to reflect current practices and program structures.

Section 20.28 is amended to add additional factors that should be considered by agencies in development and implementation of Mentor-Protégé programs and the relationships under those programs. Additional changes are made to clarify the rule, to delete or update obsolete references, or to reflect current practices and program structures.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rules will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be by clarifying for potential HUB applicants and currently registered HUBs the criteria for becoming and remaining a HUB; and continuing the HUB program in compliance with existing legal requirements. The proposed amendments would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rules.

Comments on the proposals may be submitted to David Duncan, Deputy General Counsel, P.O. Box 13186, Austin, Texas 78711-3186, or e-mail comments to: david.duncan@cpa.state.tx.us. Public hearings will be held at the following locations and dates:

McAllen

Thursday, March 3, 2011 2:00 p.m. - 5:00 p.m. at the Texas Department of Transportation Regional Office, VTC Conference Room, 600 West Expressway U.S. 83, Pharr, Texas 78577.

Houston

Wednesday, March 9, 2011 6:00 p.m. - 8:00 p.m. at Texas Southern University, Thurgood Marshall School of Law, Moot Court Room 105, corner of Wheeler Street and Cobb Street, Houston, Texas 77004.

Austin

Thursday, March 17, 2011 1:30 p.m. - 4:00 p.m. at the Central Services Building, Room 402, 1711 San Jacinto Street, Austin, Texas 78701.

Dallas

Thursday, March 24, 2011 6:00 p.m. - 8:00 p.m. at the J. Erik Jonsson Central Library, O'Hara Room (7th Floor) 1515 Young Street, Dallas, Texas 75202.

The amendments are proposed under the authority of Government Code, Chapter 2161, which provides in §2161.0012 authority for the comptroller to adopt rules as necessary to efficiently and effectively administer the state's HUB program. Additionally, §2161.002(c) requires that the comptroller adopt rules as necessary to respond to the findings of the updated Disparity Study performed on behalf of the state.

The amendments implement Government Code, §§2161.0011, 2161.0012, 2161.002, 2161.0015, 2161.004, 2161.061, 2161.062, 2161.065, 2161.181, and 2161.252.

§20.13. Statewide Annual HUB [~~Procurement~~] Utilization Goals.

(a) In accordance with §20.10 [~~§111.11~~] of this title (relating to Policy and Purpose) and [~~the Texas~~] Government Code, § [~~Sections~~]2161.181 and §2161.182, each state agency shall make a good faith effort to utilize HUBs in contracts for construction, services (including professional and consulting services) and commodities purchases. Each agency may achieve the statewide and/or agency-specific annual HUB [~~procurement~~] goals specified in the agency's Legislative Appropriations Request by contracting directly with HUBs or indirectly through subcontracting opportunities.

(b) The statewide HUB goals (by contracting category) for the State of Texas are [~~Each state agency shall make a good faith effort to assist HUBs in receiving a portion of the total contract value of all contracts that the agency expects to award in a fiscal year in accordance with the following percentages~~]:

(1) 11.2% [~~11.9%~~] for heavy construction other than building contracts;

(2) 21.1% [~~26.1%~~] for all building construction, including general contractors and operative builders contracts;

(3) 32.7% [~~57.2%~~] for all special trade construction contracts;

(4) 23.6% [~~20%~~] for professional services contracts;

(5) 24.6% [~~33%~~] for all other services contracts; and

(6) 21% [~~12.6%~~] for commodities contracts.

(c) State agencies shall establish their own HUB program goals for each procurement category. At a minimum, the statewide HUB goals should be each agency's starting point for establishing agency-specific goals. However, it [~~Each state agency shall make a good faith effort to meet or exceed the goals outlined in subsection (b) of this section. The percentage goals established in subsection (b) are overall annual procurement goals for each state agency applicable to the total annual dollar amount of an agency's contracts for each of the specific types of contracts. It~~] may not be practicable to apply these goals to each agency's procurement activities. Each [~~contract. For each contract,~~] state agency [~~agencies~~] may set higher or lower procurement goals than those outlined in subsection (b) of this section. Agencies may consider HUB availability, HUB utilization and total annual agency contract expenditure, geographical location of the project, the contractual scope of work, or other relevant factors. By implementing the following procedures, an agency shall be presumed to have made a good faith effort:

(1) prepare and distribute information on procurement procedures in a manner that encourages participation in state contracts by all businesses;

(2) divide proposed requisitions into reasonable lots in keeping with industry standards and competitive bid requirements;

(3) where feasible, assess bond and insurance requirements and design requirements that reasonably permit more than one business to perform the work;

(4) specify reasonable, realistic delivery schedules consistent with an agency's actual requirements;

(5) ensure that specifications, terms, and conditions reflect an agency's actual requirements, are clearly stated, and do not impose unreasonable or unnecessary contract requirements;

(6) provide potential bidders with referenced list of certified HUBs for subcontracting;

(7) develop and apply a written methodology to determine whether specific agency wide [~~agencywide~~] goals are appropriate under the Disparity Study, as some HUB groups have not been underutilized within applicable contracting categories and should not be included in the HUB goals for that category, or whether the statewide goals from the Disparity Study are appropriate for the agency;

(8) identify potential subcontracting opportunities in all contracts and require a HUB subcontracting plan for contracts of $100,000 or more over the life of the contract (including any renewals), where such opportunities exist, in accordance with [~~the Texas~~] Government Code, [~~Chapter 2161, Subchapter F,~~] §2161.251; and

(9) seek HUB subcontracting in contracts that are less than $100,000 whenever possible.

(d) A state agency may also demonstrate good faith under this section by submitting a supplemental letter with documentation to the comptroller [~~Commission~~] with their HUB report [~~Report~~] or legislative appropriations request identifying the progress, including, but not limited to the following, as prescribed by the comptroller [~~commission~~]:

(1) identifying the percentage of contracts (prime and subcontracts) awarded to women and/or minority-owned businesses that are not certified as HUBs;

(2) demonstrating that a different goal from that identified in subsection (b) of this section was appropriate given the agency's types of purchases;

(3) demonstrating that a different goal was appropriate given the particular qualifications required by an agency for its contracts;

(4) demonstrating that a different goal was appropriate given that graduated HUBs cannot be counted toward the goal; or

(5) demonstrating assistance to noncertified HUBs in obtaining certification with the comptroller [~~commission~~].

§20.14. Subcontracts.

(a) Analyzing potential contracts of $100,000 or more. [~~General Provisions~~]

[~~(1)~~] In accordance with [~~Texas~~] Government Code, Chapter 2161, Subchapter F, each state agency that considers entering into a contract with an expected value of $100,000 or more over the life of the contract (including any renewals) shall, before the agency solicits bids, proposals, offers, or other applicable expressions of interest, determine whether subcontracting opportunities are probable under the contract.

(1) [~~(A)~~] State agencies shall use the following steps to determine if subcontracting opportunities are probable under the contract:

(A) examining the scope of work to be performed under the proposed contract and determining if it is likely that some of the work may be performed by a subcontractor;

[(i) ~~Use the HUB participation goals in §111.13 of this title (relating to Annual Procurement Utilization Goals); and~~]

(B) [~~(ii)~~] research [~~Research~~] the Centralized Master Bidders List, the HUB Directory, the Internet, and other directories, identified by the comptroller [~~commission~~], for HUBs that may be available to perform the contract work; and [~~.~~]

(C) an agency may determine that subcontracting is probable for only a subset of the work expected to be performed or the funds to be expended under the contract. If an agency determines that subcontracting is probable on only a portion of a contract, it shall document its reasons in writing for the procurement file.

(2) [~~(B)~~] In addition, determination of subcontracting opportunities may include, but is not limited to, the following:

(A) [~~(i)~~] contacting other state and local agencies and institutions of higher education to obtain information regarding similar contracting and subcontracting opportunities; and

(B) [~~(ii)~~] reviewing the history of similar agency purchasing transactions.

(b) Receipt of HUB subcontracting plans.

(1) [~~(2)~~] If, through the analysis in subsection (a) of this section, an agency determines that subcontracting opportunities are probable, then its [~~each agency's~~] invitation for bids, request [~~requests~~] for proposals or other purchase solicitation documents [~~for construction, professional services, other services, and commodities with an expected value of $100,000 or more~~] shall state that probability and require a HUB subcontracting plan. A bid, proposal, offer, or other expression of interest to such a solicitation must include a completed HUB subcontracting plan to be considered responsive.

(2) [~~(A)~~] The HUB subcontracting plan shall be submitted with the respondent's response on or before [~~at the same time as~~] the due date for responses [~~response (bid, proposal, offer, or other applicable expression of interest)~~], except for construction contracts involving alternative delivery methods. For construction contracts involving alternative delivery methods, the HUB subcontracting plan may be submitted up to 24 hours following the date/time that responses are due provided that responses are not opened until the HUB subcontracting plan is received.

(3) [~~(B)~~] Responses that do not include a completed HUB subcontracting plan in accordance with [~~paragraph (3) of~~] this subsection [~~section,~~] shall be rejected due to material failure to comply with Government Code, §2161.252(b) [~~advertised specifications in accordance with §113.6(a) of this title (relating to Bid Evaluation and Award)~~].

(4) If a properly submitted HUB subcontracting plan contains minor deficiencies (e.g., failure to sign or date the plan, failure to submit already-existing evidence that three HUBs were contacted), the agency may contact the respondent for clarification to the plan if it contains sufficient evidence that the respondent developed and submitted the plan in good faith.

(c) Requirements of a HUB subcontracting plan.

(1) [~~(3)~~] A state agency shall require a respondent to state whether it is a certified HUB. A state agency shall also require a respondent to state overall subcontracting and overall certified HUB subcontracting to be provided in the contract. Respondents shall follow procedures in paragraph (2)(A) - (D) of this subsection [~~(a)(3)(A)(i),~~

~~(a)(3)(A)(ii), and (a)(3)(A)(iii) of this section~~] when developing the HUB subcontracting plan.

(2) [~~(A)~~] The HUB subcontracting plan shall include the agency's HUB goals for its HUB business plan, and shall consist of completed forms prescribed by the comptroller [~~Texas Building and Procurement Commission~~] and shall include the following:

(A) [~~(i)~~] certification that respondent has made a good faith effort to meet the requirements of this section;

(B) [~~(ii)~~] identification of the subcontractors that will be used during the course of the contract;

(C) [~~(iii)~~] the expected percentage of work to be subcontracted; and

(D) [~~(iv)~~] [~~and~~] the approximate dollar value of that percentage of work. [~~The plan shall include goals established pursuant to §111.13 of this title (relating to Annual Procurement Utilization Goals).~~]

(3) [~~(B)~~] The successful respondent shall provide all additional documentation required by the agency to demonstrate compliance with good faith effort requirements prior to contract award. If the successful respondent fails [~~is unable~~] to provide supporting documentation (phone logs, fax transmittals, electronic mail, etc.) within the timeframe specified by the agency to demonstrate compliance with this subsection prior to contract award, that respondent's bid/proposal shall be rejected for material failure to comply with advertised specifications and state law.

(d) Establishing good faith effort by respondent.

[~~(b) Construction Contracts.~~]

(1) Evidence of good faith effort in developing a HUB subcontracting plan [~~for construction contracts, including heavy construction, building construction, and special trade construction~~] includes, but is not limited to, the following efforts by a contractor [~~procedures~~]:

(A) Divide the contract work into reasonable lots or portions to the extent consistent with prudent industry practices.

(B) Provide written justification of the selection process if the selected [~~a non HUB~~] subcontractor is not a HUB [~~selected~~].

(C) Provide notice to at least one (1) minority or women trade organizations or development centers to assist in identifying HUBs by disseminating subcontracting opportunities to their membership/participants. The notice shall, in all instances, include the scope of work, information regarding location to review plans and specifications, information about bonding and insurance requirements, and identify a contact person. Respondent must provide notice to organizations or development centers no less than five (5) working days [~~for construction contracts~~] prior to submission of the response unless circumstances require a different time period, which is determined by the agency and documented in the contract file [~~(bid, proposal, offer, or other applicable expression of interest)~~].

(D) Notify at least three (3) HUB businesses [~~HUBs~~] of the subcontracting opportunities that the respondent intends to subcontract. The respondent shall provide the notice described in this section to three or more HUBs per each subcontracting opportunity that provide the type of work required for each subcontracting opportunity identified in the contract specifications or any other subcontracting opportunity the respondent cannot complete with its own equipment, supplies, materials, and/or employees. The [~~preferable method of~~] notification shall be in writing, and the respondent must document the HUBs contacted on the forms prescribed by the comptroller. The notice shall, in all instances, include the scope of the work, information regarding the location to review plans and specifications, information about bonding and insurance requirements, and identify a contact person. The notice shall be provided to potential HUB subcontractors at least five (5) working days prior to submission of the respondent's response, unless circumstances require a different time period, which is determined by the agency and documented in the contract file.

[~~(2) The respondent shall provide potential HUB subcontractors reasonable time to respond to the respondent's notice. "Reasonable time to respond" in this context is no less than five (5) working days for construction contracts, including heavy construction, building construction, and special trade construction, from receipt of notice, unless circumstances require a different time period, which is determined by the agency and documented in the contract file.~~]

(2) [~~(3)~~] The respondent shall use the comptroller's [~~commission's~~] Centralized Master Bidders List, the HUB Directory, Internet resources, and/or other directories as identified by the comptroller [~~commission~~] or the agency when searching for HUB subcontractors. Respondents may utilize [~~rely on~~] the services of minority, women, and community organizations contractor groups, local, state, and federal business assistance offices, and other organizations that provide assistance in identifying qualified applicants for the HUB program who are able to provide all or select elements of the HUB subcontracting plan.

[~~(4) The respondent shall provide the notice described in this section to three or more HUBs per each subcontracting opportunity that provide the type of work required for each subcontracting opportunity identified in the contract specifications or any other subcontracting opportunity the respondent cannot complete with its own equipment, supplies, materials, and/or employees. The respondent must document the HUBs contacted on the forms prescribed by the Texas Building and Procurement Commission.~~]

[~~(c) Professional Services Contracts.~~]

[~~(1) Evidence of good faith effort in developing a HUB subcontracting plan for professional services contracts is established if the prime contractor meets the following conditions and procedures:~~]

[~~(A) A HUB subcontracting plan for a professional services contract which meets or exceeds HUB participation goals in §111.13 of this title (relating to Annual Procurement Utilization Goals), constitutes good faith effort under this section, or~~]

[~~(B) Develop a HUB Subcontracting Plan under the following procedures:~~]

~~*(i)* Divide the contract work into reasonable lots or portions to the extent consistent with prudent industry practices.~~]

~~*(ii)* Notify HUBs of the subcontracting opportunities that the respondent intends to subcontract. The preferable method of notification shall be in writing. The notice shall, in all instances, include the scope of the work, required qualifications, and identify a contact person. The notice shall be provided to potential HUB subcontractors prior to submission of the respondent's response.~~]

[~~(2) The respondent shall provide potential HUB subcontractors reasonable time to respond to the respondent's notice. "Reasonable time to respond" in this context is no less than five (5) working days from receipt of notice, unless circumstances require a different time period, which is determined by the agency and documented in the contract file.~~]

[~~(3) The respondent shall use the commission's Centralized Master Bidders List, the HUB Directory, Internet resources, and/or other directories as identified by the commission or agency when searching for HUB subcontractors. Respondents may rely on the services of minority, women, and community organizations,~~]

~~contractor groups, local, state, and federal business assistance offices, and other organizations that provide assistance in identifying qualified applicants for the HUB program who are able to provide all or select elements of the HUB subcontracting plan.~~]

[~~(4) The respondent shall provide the notice described in this section to three or more HUBs per each subcontracting opportunity that provide the type of work required for each subcontracting opportunity identified in the contract specifications or any other subcontracting opportunity the respondent cannot complete with its own equipment, supplies, materials, and/or employees. The respondent must document the HUBs contacted on the forms provided by the Texas Building and Procurement Commission.~~]

[~~(A) Provide written justification of the selection process if a non HUB subcontractor is selected.~~]

[~~(B) Provide notice to minority or women trade organizations or development centers to assist in identifying HUBs by disseminating subcontracting opportunities to their membership/participants. The notice shall, in all instances, include the scope of the work, required qualifications, and identify a contact person. Respondent must provide notice to organizations or development centers no less than five (5) working days prior to submission of response (bid, proposal, offer, or other applicable expression of interest).~~]

[~~(d) Commodities and Other Services Contracts.~~]

[~~(1) Evidence of good faith effort in developing a HUB subcontracting plan for commodities and other services contracts includes, but is not limited to, the following procedures:~~]

[~~(A) Divide the contract work into reasonable lots or portions to the extent consistent with prudent industry practices.~~]

[~~(B) Notify HUBs of the subcontracting opportunities that the respondent intends to subcontract. The preferable method of notification shall be in writing. The notice shall, in all instances, include the scope of the work, specifications, and identify a contact person. The notice shall be provided to potential HUB subcontractors prior to submission of the respondent's response.~~]

~~(i)~~ ~~The respondent shall provide potential HUB subcontractors reasonable time to respond to the respondent's notice. "Reasonable time to respond" in this context is no less than five working days from receipt of notice, unless circumstances require a different time period, which is determined by the agency and documented in the contract file.~~]

~~(ii)~~ ~~The respondent shall use the commission's Centralized Master Bidders List, the HUB Directory, Internet resources, and/or other directories as identified by the commission or agency when searching for HUB subcontractors. Respondents rely on the services of minority, women, and community organizations, contractor groups, local, state, and federal business assistance offices, and other organizations that provide assistance in identifying qualified applicants for the HUB program who are able to provide all or select elements of the HUB subcontracting plan.~~]

~~(iii)~~ ~~The respondent shall provide the notice described in this section to three or more HUBs per each subcontracting opportunity that provide the type of work required for each subcontracting opportunity identified in the contract specifications or any other subcontracting opportunity the respondent cannot complete with its own equipment, supplies, materials, and/or employees. The respondent must document the HUBs contacted on the forms provided by the Texas Building and Procurement Commission.~~]

[~~(C) Provide written justification of the selection process if a non HUB subcontractor is selected.~~]

[~~(D) Provide notice to minority or women trade organizations or development centers to assist in identifying HUBs by disseminating subcontracting opportunities to their membership/participants. The notice shall, in all instances, include the scope of the work, specifications, and identify a contact person. Respondent must provide notice to organizations or development centers no less than five (5) working days for construction contracts prior to submission of the response (bid, proposal, offer, or other applicable expression of interest).~~]

(3) [~~(2)~~] In making a determination if a good faith effort has been made in the development of the required HUB subcontracting plan, a state agency may require the respondent to submit supporting documentation explaining how the respondent has made a good faith effort according to each criterion listed in subsection (c)(2)(A) - (D) [~~(a)(3)(A)(i), (a)(3)(A)(ii), and (a)(3)(A)(iii)~~] of this section. The documentation shall include at least the following:

(A) how the respondent divided the contract work into reasonable lots or portions consistent with prudent industry practices;

(B) how the respondent's notices contain adequate information about bonding, insurance, the availability of plans, the specifications, scope of work, required qualifications and other requirements of the contract allowing reasonable time for HUBs to participate effectively;

(C) how the respondent negotiated in good faith with qualified HUBs, not rejecting qualified HUBs who were also the best value responsive bidder; and

(D) how the respondent provided notice to minority or women trade organizations or development centers to assist in identifying HUBs by disseminating subcontracting opportunities to their membership/participants. [~~; and~~]

[~~(E) for contracts subject to (c)(1)(A), how the respondent plans to subcontract with certified HUBs in an effort to meet or exceed HUB participation goals in §111.13 of this title (relating to Annual Procurement Utilization Goals) for each identified subcontracting opportunity.~~]

(4) [~~(3)~~] A respondent's participation in a Mentor-Protégé Program under [~~the Texas~~] Government Code, §2161.065, and the submission of a protégé as a subcontractor in the HUB subcontracting plan constitutes a good faith effort for the particular area to be subcontracted with the protégé. When submitted, state agencies may accept a Mentor-Protégé Agreement that has been entered into by the respondent (mentor) and a certified HUB (protégé). The agency shall consider the following in determining the respondent's good faith effort:

(A) if the respondent has entered into a fully executed Mentor-Protégé Agreement that has been registered with the comptroller [~~commission~~] prior to submitting the plan, and

(B) if the respondent's HUB subcontracting plan identifies the areas of subcontracting that will be performed by the protégé.

(5) [~~(4)~~] If the respondent is able to fulfill any of the potential subcontracting opportunities identified with its own equipment, supplies, materials and/or employees, respondent must sign an affidavit and provide a statement explaining how the respondent intends to fulfill each subcontracting opportunity. The respondent must agree to provide the following if requested by the agency:

(A) evidence of existing staffing to meet contract objectives;

(B) monthly payroll records showing company staff fully engaged in the contract; [~~and~~]

(C) on site reviews of company headquarters or work site where services are to be performed; and [.]

(D) documentation proving employment of qualified personnel holding the necessary licenses and certificates required to perform the work.

(e) [~~(5)~~] Reviewing the HUB subcontracting plan. The HUB subcontracting plan shall be reviewed and evaluated prior to contract award and, if accepted, shall become a provision of the agency's contract. Revisions necessary to clarify and enhance information submitted in the original HUB subcontracting plan may be made in an effort to determine good faith effort. State agencies shall review the documentation submitted by the respondent to determine if a good faith effort has been made in accordance with this section. If the agency determines that a submitted HUB subcontracting plan was not developed in good faith, the agency shall treat that determination [~~the lack of good faith~~] as a material failure to comply with advertised specifications, and the subject response (bid, proposal, offer, or other applicable expression of interest) shall be rejected. The reasons for rejection shall be recorded in the procurement file.

~~[(6) If the respondent is selected and decides to subcontract any part of the contract after the award, as a provision of the contract, the contractor/vendor must comply with provisions of this section relating to developing and submitting a subcontracting plan before any modifications or performance in the awarded contract involving subcontracting can be authorized by the state agency. If the selected contractor/vendor subcontracts any of the work without prior authorization and without complying with this section, the contractor/vendor would be deemed to have breached the contract and be subject to any remedial actions provided by Texas Government Code, Chapter 2161, state law and this section. Agencies may report nonperformance relative to its contracts to the commission in accordance with Chapter 113, Subchapter F of this title (relating to the Vendor Performance and Debarment Program).]~~

~~[(7) If at any time during the term of the contract, a contractor/vendor desires to make changes to the approved subcontracting plan, proposed changes must be received for prior review and approval by the state agency before changes will be effective under the contract. The contractor/vendor must comply with provisions of subsection (a), paragraph 3, relating to developing and submitting a subcontracting plan for substitution of work or of a subcontractor, prior to any alternatives being approved under the subcontracting plan. The state agency shall approve changes by amending the contract or by another form of written agency approval. The reasons for amendments or other written approval shall be recorded in the procurement file.]~~

~~[(8) If a state agency expands the original scope of work through a change order or contract amendment, including a contract renewal that expands the scope of work, the state agency shall determine if the additional scope of work contains additional probable subcontracting opportunities not identified in the initial solicitation. If the agency determines additional probable subcontracting opportunities exist, the agency will require the contractor/vendor to submit a HUB subcontracting plan/revised HUB subcontracting plan for the additional probable subcontracting opportunities.]~~

~~[(9) The HUB subcontracting plan/revised HUB subcontracting plan shall comply with the provisions of this section relating to development and submission of a subcontracting plan before any modifications or performance in the awarded contract involving the additional scope of work can be authorized by the agency. If the contractor/vendor subcontracts any of the additional subcontracting opportunities identified by the agency without prior authorization and without complying with this section, the contractor/vendor would be deemed to have breached the contract and be subject to any remedial actions provided by Texas Government Code, Chapter 2161, state law and this section. Agencies may report nonperformance relative to its contracts to the commission in accordance with Chapter 113, Subchapter F of this title (relating to the Vendor Performance and Debarment Program.)]~~

(f) Maintaining records.

(1) [~~(10)~~] Prime contractors [~~The contractor/vendor~~] shall maintain business records documenting [~~its~~] compliance with the HUB subcontracting plan and shall submit a compliance report to the contracting agency monthly, [~~and~~] in the format required by the comptroller [~~Texas Building and Procurement Commission~~]. The compliance report submission shall be required as a condition for payment.

(2) [~~(11)~~] During the term of the contract, the state agency shall monitor the HUB subcontracting plan monthly to determine if the value of the subcontracts to HUBs meets or exceeds the HUB subcontracting provisions specified in the contract. Accordingly, state agencies shall audit and require a prime contractor [~~contractor/vendor to whom a contract has been awarded~~] to report to the agency the identity and the amount paid to its subcontractors in accordance with §20.16(b) [~~§111.16(c)~~] of this title (relating to State Agency Reporting Requirements). If the prime contractor [~~contractor/vendor~~] is meeting or exceeding the provisions, the state agency shall maintain documentation of the prime contractor's [~~contractor's/vendor's~~] efforts in the contract file. If the prime contractor [~~contractor/vendor~~] fails to meet the HUB subcontracting provisions specified in the contract, the state agency shall notify the prime contractor of any deficiencies. The state agency shall give the prime contractor [~~contractor/vendor~~] an opportunity to submit documentation and explain to the state agency why the failure to fulfill the HUB subcontracting plan should not be attributed to a lack of good faith effort by the prime contractor [~~contractor/vendor~~].

(g) Monitoring HUB subcontracting plan during the contract.

(1) If the selected respondent decides to subcontract any part of the contract in a manner that is not consistent with its HUB subcontracting plan, the selected respondent must comply with provisions of this section and submit a revised HUB subcontracting plan before subcontracting any of the work under the contract. If the selected respondent subcontracts any of the work without prior authorization and without complying with this section, the selected respondent is deemed to have breached the contract and is subject to any remedial actions provided by Government Code, Chapter 2161, other applicable state law and this section. Agencies may report nonperformance relative to its contracts to the comptroller in accordance §20.18 of this title (relating to Protests).

(2) If at any time during the term of the contract, the selected respondent desires to make changes to the approved HUB subcontracting plan, proposed changes must be received for prior review and approval by the state agency before changes will be effective under the contract. The selected respondent must comply with provisions of this section, relating to developing and submitting a subcontracting plan for substitution of work or of a subcontractor, prior to any alternatives being approved under the HUB subcontracting plan. The state agency shall approve changes by amending the contract or by another form of written agency approval. The reasons for amendments or other written approval shall be recorded in the procurement file.

(3) If a state agency expands the original scope of work through a change order or contract amendment, including a contract renewal that expands the scope of work, the state agency shall determine if the additional scope of work contains additional probable subcontracting opportunities not identified in the initial solicitation. If the agency determines probable subcontracting opportunities exist, the agency will require the selected respondent to submit a HUB subcon-

tracting plan/revised HUB subcontracting plan for the additional probable subcontracting opportunities.

(4) [~~(12)~~] To determine if the prime contractor is complying with the HUB subcontracting plan [~~contractor/vendor made the required good faith effort~~], the agency may [~~not~~] consider the [~~success or failure of the contractor/vendor to subcontract with HUBs in any specific quantity. The agency's determination is restricted to considering factors indicating good faith effort including, but not limited to, the~~] following:

(A) whether the prime contractor gave timely notice to the subcontractor regarding the time and place of the subcontracted work;

(B) whether the prime contractor facilitated access to the resources needed to complete the work [~~site, electrical power, and other necessary utilities~~]; and

(C) whether the prime contractor complied with the approved HUB subcontracting plan [~~documentation or information was provided that included potential changes in the scope of contract work~~].

(5) [~~(13)~~] If a determination is made that the prime contractor [~~contractor/vendor~~] failed to implement the HUB subcontracting plan in good faith, the agency, in addition to any other remedies, may report nonperformance to the comptroller [~~commission~~] in accordance with §20.105 of this title (relating to Debarment) and §20.106 of this title (relating to Procedures for Investigations and Debarment) [~~Chapter 113, Subchapter F of this title (relating to Vendor Performance and Debarment Program)~~]. In addition, if the prime contractor [~~contractor/vendor~~] failed to implement the HUB subcontracting plan in good faith, the agency may revoke the contract for breach of contract and make a claim against the prime contractor [~~contractor/vendor~~].

(6) [~~(14)~~] State agencies shall review their procurement procedures to ensure compliance with this section. [~~In accordance with §111.26 of this title (relating to HUB coordinator responsibilities) the agency's HUB coordinator and contract administrators should facilitate institutional compliance with this section.~~]

§20.15. Agency Planning Responsibilities.

(a) Agencies are required to prepare a written HUB business plan for the use of HUBs in purchasing, and in public works contracts in accordance with [~~Texas~~] Government Code, [~~Chapter 2056, and Chapter 2161,~~] §2161.123.

(b) Pursuant to Government Code, §2161.003, state agencies [~~An agency~~] shall adopt the comptroller's [~~commission's~~] rules related to administering Government Code, Chapter 2161, Subchapters B and C [~~the HUB Program as part of its required strategic plan~~].

(c) Agencies must include a detailed report with their appropriations request identifying Good Faith Effort [~~(GFE)~~] compliance. The report should include the agency's effort to identify HUBs for contracts and subcontracts, the agency's utilization of HUBs and the agency's successes and shortfalls to increase HUB participation.

§20.16. State Agency Reporting Requirements.

~~[(a) The comptroller will report to the commission not later than March 15 of each year regarding the previous six-month period, and on September 15 of each year regarding the preceding fiscal year, the payments made for the purchase of goods, services and public works awarded and actually paid from treasury funds by each state agency. Subject to the capabilities of the comptroller's USAS system, the comptroller shall identify state agencies' purchases from state term contracts which are paid from treasury funds so that those purchases awarded and actually paid under term contracts may be included in the commission's report of its own purchases.]~~

(a) [~~(b)~~] State agencies will report to the comptroller [~~commission~~], not later than March 15 of each year regarding the previous six-month period and on September 15 of each year regarding the preceding fiscal year, the payments made for the purchase of goods and services awarded and actually paid from non-treasury funds by the state agency. The report shall include information requested by the comptroller [~~commission~~] and shall be in a form prescribed by the comptroller [~~commission~~]. State agencies' purchases from state term contracts/group purchases which are paid from non-treasury funds must be identified on the report as such so that they may be reflected on the comptroller's [~~commission's~~] report of its own purchases.

(b) [~~(c)~~] State agencies shall maintain, and compile monthly, information relating to the agency's and each of its operating division's use of HUBs [~~historically underutilized businesses~~], including information regarding subcontractors and suppliers. This information shall include but is not limited to the information required in [~~subsections (a) and (b) of~~] this section. On a monthly basis, state agencies shall require their prime contractor [~~a contractor/vendor to whom a state agency has awarded a contract~~] to report to the agency the identity and amount paid to each HUB and non-HUB subcontractor [~~historically underutilized business~~] to whom the prime contractor [~~contractor/vendor~~] has awarded a subcontract for the purchase of supplies, materials and equipment. Prime contractors [~~, provided that payment was made to a historically underutilized business in the month to be reported. Contractors/Vendors~~] shall report to the applicable [~~a~~] state agency the progress payments made to subcontractors[~~, professionals, consultants~~] and suppliers [~~certified as historically underutilized businesses~~] each month in which such payment is made.

(c) [~~(d)~~] State agencies will report to the comptroller [~~commission~~], not later than March 15 of each year regarding the previous six-month period and on September 15 of each year regarding the preceding fiscal year, the total dollar amount of HUB and non-HUB contracting and [~~historically underutilized business~~] subcontracting participation in all of the agencies' contracts for the purchase of goods, services and public works payments. State agencies must include contracting and subcontracting participation paid from treasury [~~Treasury~~] and non-treasury [~~Non-Treasury~~] funds.

(d) [~~(e)~~] State agencies that participate in a group purchasing program under [~~Texas~~] Government Code, §2155.134 shall include a separate report to the comptroller [~~commission~~], not later than March 15 of each year regarding the previous six-month period and September 15 of each year regarding the preceding fiscal year, of purchases that are made through the group purchasing program and shall report the dollar amount of each purchase that is allocated to the reporting agency.

(e) [~~(f)~~] The comptroller [~~commission~~] shall prepare a consolidated report based on a compilation and analysis of the reports submitted by each state agency and other information available to [~~provided by~~] the comptroller [~~in the format specified by the commission~~]. These reports of HUB [~~historically underutilized business~~] purchasing and contracts shall form a record of each agency's purchases in which the agency selected the contractor[~~/vendor~~]. If the contractor[~~/vendor~~] was selected by the comptroller [~~commission~~] as part of its state term contract program, the purchase will be reflected on the comptroller's [~~commission's~~] report of its own purchases. The comptroller [~~commission~~] report will contain the following information:

(1) the total dollar amount of payments made by each state agency;

(2) the total number of HUBs actually paid by each state agency;

(3) the total number of contracts awarded to HUBs by each state agency;

(4) the number of bids received from HUBs by each state agency; and

(5) the graduation rates of HUBs as defined in §20.23 [§111.23] of this title (relating to Graduation Procedures) for the following groups as defined in §20.11 [§111.12] of this title (relating to Definitions) and certified by the comptroller [commission]:

(A) Black Americans;

(B) Hispanic Americans;

(C) American Women;

(D) Asian Pacific Americans; and

(E) Native Americans.

(f) [(g)] On April 15 of each year, the comptroller [commission] shall submit the consolidated report regarding the previous six-month period and on October 15 of each year regarding the preceding fiscal year to the presiding officer of each house of the legislature, the members of the legislature and the joint select committee.

(g) [(h)] State agencies will receive HUB credit for the total payments [value of contracts] awarded directly to certified prime and subcontract HUBs under the Vendor Identification Number in the comptroller's [commission's] HUB Directory. When the prime contractor[/vendor] is a HUB, it must perform at least 25% of the total value of the contract with its own or leased employees, as defined by the Internal Revenue Service, in order for the agency to receive 100% HUB credit for the entire contract. A [The] prime [HUB] contractor[/vendor] that is a HUB may subcontract up to 75% of the contract with HUBs or non-HUB subcontractors. If a prime HUB contractor's[/vendor's] HUB subcontracting plan identifies that it is planning to perform less than 25% of the total value of contract with its employees, the agency will receive HUB credit for the value of the contract that was actually performed by the prime HUB contractor[/vendor] and its HUB subcontractors. To obtain HUB credit, the agency must report its HUB subcontracting expenditures to the comptroller [commission] in accordance with subsection (c) [(d)] of this section.

(h) [(i)] Any prime HUB contractor[/vendor] that seeks to satisfy the good faith effort requirement shall report to the agency the identity and amount paid to each HUB [historically underutilized business] each month in which such payment is made. The report will include the volume of work performed under the contract, the portion of the work that was performed with its employees, non-HUB contractors[/vendors] and other HUB contractors[/vendors]. The agency may request payment documentation in accordance with subsection (b) [(c)] of this section and the HUB subcontracting plan that confirms the performance of the contractor[/vendor]. The agency shall discuss the performance of the contractor[/vendor] and document the contractor's [contractor/vendor's] performance in the contract file. Any deficiencies will be identified by the agency and must be rectified prior to the next reporting period by the contractor[/vendor].

§20.17. Certification Process.

(a) A business seeking certification as a HUB [historically underutilized business] must submit an application to the comptroller [commission] in a form prescribed by the comptroller [commission], affirming under penalty of perjury that the business qualifies as a HUB [historically underutilized business].

(b) If requested by the comptroller [commission], the applicant must provide any and all materials and information necessary to demonstrate an economically disadvantaged person's active participation in the control, operation, and management of the HUB [historically underutilized business].

[(c) Texas Government Code, §2161.231, provides that a person commits a felony of the third degree if the person intentionally applies as an historically underutilized business for an award of a purchasing contract or public works contract and the person knowingly does not meet the definition of a historically underutilized business.]

(c) [(d)] It shall be the burden of the person claiming Texas residency to prove their status through submission of adequate and appropriate documentation. Such documentation may include, but is not limited to, a current valid Texas driver's license or I.D. card, voter registration card showing Texas address, appraisal statement for Texas real property (including whether a homestead exemption was claimed for that real property), or recent paid utility statements. The comptroller [commission] shall certify the applicant as a HUB [historically underutilized business] or provide the applicant with written justification of its denial of certification within 90 days after the date the comptroller [commission] receives a satisfactorily completed application from the applicant.

(d) [(e)] The comptroller [commission] reviews and evaluates applications, and may reject an application based on one or more of the following:

(1) the application is not satisfactorily completed;

(2) the applicant does not meet the requirements of the definition of HUB [historically underutilized business];

(3) the application contains false information;

(4) the applicant does not provide required information in connection with the certification review conducted by the comptroller [commission]; or

(5) the applicant's record of performance on any prior contracts with the state.

(e) [(f)] The comptroller [commission] may approve the existing certification program of one or more local governments or nonprofit organizations in this state that certify historically underutilized businesses, minority business enterprises, women's business enterprises, or disadvantaged business enterprises that substantially fall under the same definition, to the extent applicable for HUBs [historically underutilized businesses] found in Government Code, §2161.001 [§2161.001, Texas Government Code], and maintain them on the comptroller's [commission's] Historically Underutilized Businesses List, if the local government or nonprofit organization:

(1) [the local government or nonprofit organization] meets or exceeds the standards established by the comptroller [commission] as set out in this subchapter [Chapter 111, Subchapter B of this title (relating to the Historically Underutilized Business Program)]; and

(2) agrees to the terms and conditions as required by statute relative to the agreement between the local government and/or nonprofits for the purpose of certification of HUBs [historically underutilized businesses].

(f) [(g)] The agreement in subsection (e) [(f)] of this section must take effect immediately and contain conditions as follows:

(1) allow for automatic certification of businesses certified by the local government or nonprofit organization as prescribed by the comptroller [commission];

(2) provide for the efficient updating of the comptroller [commission] database containing information about HUBs [historically underutilized businesses] and potential HUBs [historically underutilized businesses] as prescribed by the comptroller [commission];

(3) provide for a method by which the comptroller [~~commission~~] may efficiently communicate with businesses certified by the local government or nonprofit organization;

(4) provide those businesses with information about the state's Historically Underutilized Business Program; and

(5) require that a local government or nonprofit organization that enters into an agreement under subsection (e) [~~(f)~~] of this section, complete the certification of an applicant with written justification of its certification denial within the period established by the comptroller [~~commission~~] in its rules for certification.

(g) [~~(h)~~] The comptroller [~~commission~~] will not accept the certification of a local government or nonprofit organization that charges for the certification of businesses to be listed on the Historically Underutilized Business List maintained by the comptroller [~~commission~~].

(h) [~~(i)~~] The comptroller [~~commission~~] may terminate an agreement made under this section if a local government or nonprofit organization fails to meet the standards established by the comptroller [~~commission~~] for certifying HUBs [~~historically underutilized businesses~~]. In the event of the termination of an agreement, those HUB's that were certified as a result of the agreement will maintain their HUB status during the fiscal year in which the agreement was in effect. Those HUB's who are removed from the HUB list as a result of the termination of an agreement with a local government or nonprofit organization may apply directly to the comptroller [~~commission~~] for certification as a HUB [~~historically underutilized business~~].

(i) [~~(j)~~] The comptroller [~~commission~~] will send all certified HUBs an orientation packet including a certificate, description of certification value/significance, list of agency purchasers, and information regarding electronic commerce, the Texas Marketplace, and the state procurement process.

(j) The certification is valid for a four-year period beginning on the date TPASS certified the applicant as a HUB.

§20.18. Protests.

An applicant may protest the comptroller's [~~commission's~~] denial of its application by filing a written protest with the comptroller [~~commission~~] within 30 days after the date the comptroller [~~commission~~] sent notice of the disposition to the applicant. Comptroller [~~Commission~~] staff will then prepare a recommendation for review by the [~~executive~~] director of the TPASS division of the comptroller [~~commission~~]. The decision of the [~~executive~~] director is final.

§20.19. Recertification.

~~[(a) The certification is valid for a four-year period beginning on the date the commission certified the applicant as a historically underutilized business.]~~

[~~(b)~~] Upon expiration of the four-year period, HUBs [~~historically underutilized business~~] that desires recertification must:

(1) return a completed recertification form as provided by the comptroller [~~commission~~]; and

(2) comply with the requirements specified in §20.17 [~~§111.17~~] of this title (relating to the Certification Process) which apply to the recertification process.

§20.20. Revocation.

(a) The comptroller [~~commission~~] shall revoke the certification of a HUB [~~historically underutilized business~~] if the comptroller [~~commission~~] determines that a business does not meet the definition of HUB [~~historically underutilized business~~] or that the business fails to provide requested information in connection with a certification review conducted by the comptroller [~~commission~~]. The comptroller [~~commission~~] shall provide the business with written notice of the proposed revocation. Applicants have 30 days from receipt of the written notice to provide written documentation stating the basis for disputing the grounds for revocation. The applicant shall also submit documentation to address the deficiencies identified in the notice. The comptroller [~~commission~~] shall evaluate the documentation to confirm the applicant's eligibility. The comptroller [~~commission~~] shall provide the applicant with written notification of their certification status. If an applicant's certification is revoked, the applicant may appeal to the director of the TPASS division of the comptroller [~~commissioners~~] within 14 days of receipt of written notice of the revocation. Upon receipt of the applicant's request for appeal, the director [~~commissioners~~] will render a decision [~~vote~~] on the appeal within 30 days of receipt of [~~proposed revocation at~~] the written appeal [~~next available open meeting~~]. The decision [~~action~~] of the director [~~commissioners~~] is final.

(b) If a HUB [~~historically underutilized business~~] is barred from participating in state contracts in accordance with [~~Texas~~] Government Code, § [~~section~~] 2155.077, the comptroller [~~commission~~] shall revoke the certification of that business for a period commensurate with the debarment period.

§20.21. Certification and Compliance Reviews.

(a) The comptroller [~~commission~~] will conduct certification reviews of applicants and random compliance reviews of certified businesses by auditing them to verify the information submitted by a business is accurate, and the business continues to meet all HUB eligibility requirements after certification has been granted. Certification is subject to revocation if it is determined that a business does not qualify as an HUB [~~historically underutilized business~~]. Certification and compliance reviews of any business may be conducted upon determining a review is warranted.

(b) Businesses subject to certification and compliance reviews must provide the comptroller [~~commission~~] with any information requested to verify the certification eligibility of the business.

(c) The [~~In order to be qualified, the~~] applicant's business documentation shall be reviewed to substantiate the required [~~an applicant's~~] level of participation and control, and must demonstrate responsibility in the critical areas of the business' operation. Eligible owners must be able to make independent and unilateral business decisions which guide the future and destiny of the business, and must be proportionately responsible for the direction and management of the business. The eligible owner's level of participation in the business will be evaluated as set forth in §20.12 of the title (relating to Evaluation of Active Participation in the Control, Operation, and Management of Entities). Absentee or titular ownership by eligible owners who do not take an active role in controlling and participating in the business is not consistent with the definition of a HUB.

(d) The business must meet [~~Meet~~] all other certification and compliance requirements identified in the comptroller's [~~Commission's~~] HUB Policies and Procedures used to determined eligibility.

§20.22. Texas Historically Underutilized Business Certification Directory.

The comptroller [~~commission~~] shall compile in the most cost-efficient format a directory of businesses certified as HUBs [~~historically underutilized businesses~~]. The comptroller [~~commission~~] shall update the directory as necessary to maintain its accuracy. The comptroller [~~commission~~] shall provide a copy to state agencies, local governments and the public on a cost recovery basis upon receipt of a written request. The comptroller [~~commission~~] shall provide access to the directory either electronically or in hard copy, on CD, [~~floppy diskette, or on~~] magnetic tape, or other portable electronic media, depending on the needs

of [~~the~~] each state agency. The comptroller [~~commission~~] and state agencies shall use the directory in conjunction with the comptroller's [~~commission's~~] bidders list to solicit bids from certified HUBs for state purchasing and public works contracts.

§20.24. Program Review.

The comptroller [~~commission~~] shall revise the HUB rules based on updates of disparity studies conducted and prepared on behalf of the State of Texas. The comptroller [~~commission~~] may determine the need to reassess the HUB rules upon receipt of new disparity study information.

§20.25. Memorandum of Understanding between the Governor's Division [~~Texas Department~~] of Economic Development and Tourism and the Comptroller [~~Texas Building and Procurement Commission~~].

(a) Pursuant to the [~~Texas~~] Government Code, §481.028 the comptroller [~~Texas Building and Procurement Commission~~] adopts the following Memorandum of Understanding [~~memorandum of understanding~~] (MOU) with the Governor's Division [~~Texas Department~~] of Economic Development and Tourism, under which they agree to cooperate in program planning and budgeting relating to procurement information, and certification and technical assistance to small and historically underutilized businesses.

(b) The comptroller [~~Texas Building and Procurement Commission~~] and the Governor's Division [~~Texas Department~~] of Economic Development and Tourism mutually agree to the following in order to serve the citizens of Texas in an efficient and fiscally responsible way:

(1) to cooperate on regional economic planning with Texas;

(2) to cooperate in providing procurement information, certification and technical assistance to small and historically underutilized businesses;

(3) to share information of mutual interest;

(4) to develop the agreements necessary to accomplish the activities set forth in the MOU; and

(5) to cooperate to encourage economic development within Texas.

(c) The MOU becomes effective upon execution by authorized representatives of each agency and shall remain in effect until terminated by either party.

§20.26. HUB Coordinator Responsibilities.

(a) In accordance with [~~Texas~~] Government Code, §2161.062(e), state agencies with biennial budgets that exceed $10 million shall designate a staff member to serve as the Historically Underutilized Business (HUB) Coordinator for the agency during the fiscal year. The HUB coordinator will advise and assist agency executive directors and staff in complying with the requirements of this subchapter, [~~Chapter 111, Subchapter B of this title (relating to the Historically Underutilized Business Program), the~~ Texas] Government Code, [§]§321.013, and §2101.011, and [~~the Texas~~] Government Code, Chapter 2161.

(b) To demonstrate good faith effort, an agency shall provide the HUB coordinator with necessary and sufficient resources from its current operations and budget to effectively promote the achievement of all the responsibilities of the HUB coordinator. The HUB coordinator will assist its agency in the development of the agency's procurement specifications, HUB subcontracting plans, and evaluation of contracts for compliance. The HUB coordinator should be [~~identified~~] in a position [~~responsive role~~] that reports, communicates, and provides information directly to the agency's executive director. To assist state agencies and the comptroller [~~commission~~] with HUB compliance, the duties and responsibilities of HUB coordinators include, but are not limited to, facilitating compliance with the agency's good faith effort criteria, HUB reporting, contract administration, and marketing and outreach efforts for HUB participation. The comptroller [~~commission~~] may assist agencies, upon request, to identify other responsibilities of a HUB coordinator for compliance.

§20.27. HUB Forum Programs for State Agencies.

(a) In accordance with [~~Texas~~] Government Code, §2161.066, the comptroller [~~Commission~~] shall design a program of forums in which HUBs [~~historically underutilized businesses~~] are invited by state agencies to deliver technical and business presentations that demonstrate their capability to do business with the agency:

(1) to senior managers and procurement personnel at state agencies that acquire goods and services of a type supplied by the HUBs [~~historically underutilized businesses~~]; and

(2) to prime contractors or vendors [~~contractors/vendors~~] with the state who may be subcontracting for goods and services of a type supplied by the HUBs [~~historically underutilized businesses~~].

(b) Each agency with a biennial appropriation exceeding $10 million shall participate in the forums by sending senior managers and procurement personnel to attend relevant presentations. The agency will inform their prime contractors or vendors [~~contractors/vendors~~] about presentations relevant to subcontracting opportunities for HUBs and small businesses. The comptroller [~~commission~~] and each agency that has a HUB coordinator shall:

(1) design its own forum program and model the program, to the extent appropriate, following the format established by the comptroller [~~commission~~];

(2) sponsor presentations by HUBs at the agency offices unless agency facilities will not accommodate forum participants as determined and documented by the Agency HUB Coordinator; and

(3) identify and invite HUBs to make marketing presentations on the types of goods and services they provide.

(c) Agencies may elect to implement forums individually or cooperatively with other agencies. The agency's forum programs may include, but are not limited to, the following initiatives:

(1) providing marketing information that will direct HUBs to key staff within the agency;

(2) requesting other state agencies to assist in the preparation and planning of the forum when necessary;

(3) informing HUBs about potential contract opportunities and future awards; and

(4) preparing an annual report of each sponsored and/or cosponsored forum.

§20.28. Mentor-Protégé [~~Protege~~] Program.

(a) In accordance with [~~the Texas~~] Government Code, § [~~Section~~] 2161.065, the comptroller [~~commission~~] shall design a Mentor-Protégé [~~Protege~~] Program to foster long-term relationships between prime contractors [~~contractors/vendors~~] and Historically Underutilized Businesses (HUBs) and to increase the ability of HUBs to contract with the state or to receive subcontracts under a state contract. The objective of the Mentor-Protégé [~~Protege~~] Program is to provide professional guidance and support to the protégé [~~protege~~] to facilitate their development and growth. All participation is voluntary and program features should remain flexible so as to maximize participation. Each state agency with a biennial appropriation that exceeds $10 million shall implement a Mentor-Protégé [~~Protege~~] Program.

(b) In efforts to design a Mentor-Protégé [~~Protege~~] Program, each agency, because of its unique mission and resources, is encouraged to implement a Mentor-Protégé [~~Protege~~] Program that considers;

(1) the needs of protégé [~~protege~~] businesses requesting to be mentored;

(2) the availability of mentors who possess unique skills, talents, and experience related to the mission of the agency's program [~~Program~~]; and

(3) the agency's staff and resources.

(c) Agencies may elect to implement Mentor-Protégé [~~Protege~~] Programs individually or cooperatively with other agencies, and/or other public entities and private organizations, with skills, resources and experience in Mentor-Protégé [~~Protege~~] Programs. Agencies are encouraged to implement a Mentor-Protégé [~~Protege~~] Program to address the needs of its protégé [~~protege~~] businesses in the following critical areas of the state's procurements:

(1) construction,

(2) commodities, and/or

(3) services.

(d) State agencies may consider, but are not limited to, the following factors in developing their Mentor-Protégé [~~Protege~~] Program:

(1) develop [~~Develop~~] and implement internal procedures, including an application process, regarding the Mentor-Protégé [~~Protege~~] Program which identifies the eligibility criteria and the selection criteria for mentors and potential HUB protégé [~~protege~~] businesses;

(2) recruit prime contractor or vendor [~~Recruit contractor/vendor~~] mentors and protégé [~~proteges~~] to voluntarily participate in the program [~~Program~~];

(3) establish [~~Establish~~] a Mentor-Protégé [~~Protege~~] Program objective identifying both the roles and expectations of the agency, mentor and the protégé [~~protege~~];

(4) monitor [~~Monitor~~] the progress of the mentor protégé [~~protege~~] relationship;

(5) identify [~~Identify~~] key agency resources including senior managers and procurement personnel to assist with the implementation of the program [~~Program~~]; [~~and~~]

(6) encourage [~~Encourage~~] partnerships with local governmental and nonprofit entities to implement a community based Mentor-Protégé [~~Protege~~] Program;[~~.~~]

(7) the appropriate length of time for mentor-protégé relationships to continue. As a general matter, the statewide HUB program recommends that such relationships be limited to four years;

(8) explore other methods and procedures related to Mentor-Protégé Programs recommended in the Texas Disparity Study-2009; and

(9) assess the effectiveness of their Mentor-Protégé Program by conducting periodic surveys/interviews of both mentors and protégés.

(e) An agency's Mentor-Protégé [~~Protege~~] Program must include mentor eligibility and selection criteria. In determining the eligibility and selection of a mentor, state agencies may consider the following criteria:

(1) whether the mentor is a registered bidder on the comptroller's [~~commission's~~] Centralized Master Bidders List (CMBL);

(2) whether the mentor has extensive work experience and can provide developmental guidance in areas that meet the needs of the protégé [~~protege~~], including but not limited to, business, financial, and personnel management; technical matters such as production, inventory control and quality assurance; marketing; insurance; equipment and facilities; and/or other related resources;

(3) whether the mentor is in "good standing" with the State of Texas and is not in violation of any state statutes, rules or governing policies;

(4) whether the mentor has mentoring experience; [~~and~~]

(5) the number of protégés that a mentor can appropriately assist;

(6) [~~(5)~~] whether the mentor has a successful past work history with the agency;[~~.~~]

(7) the amount of time a HUB has participated as a mentor in the program, or in other agencies' programs; and

(8) whether and to what extent the mentor and protégé businesses share management, board members, partners, employees, or other resources that might indicate that they are related or affiliated businesses.

(f) An agency's Mentor-Protégé [~~Protege~~] Program must include protégé [~~protege~~] eligibility and selection criteria. In determining the eligibility and selection of HUB protégés [~~proteges~~], state agencies may use the following criteria:

(1) whether the protégé [~~protege~~] is eligible and willing to become certified as a HUB;

(2) whether the protégé's [~~protege's~~] business has been operational for at least one year;

(3) whether the protégé [~~protege~~] is willing to participate with a mentoring firm and will identify the type of guidance that is needed for its development;

(4) whether the protégé [~~protege~~] is in "good standing" with the State of Texas and is not in violation of any state statutes, rules or governing policies; [~~and~~]

(5) whether the protégé [~~protege~~] is involved in a mentoring relationship with another contractor; [~~/vendor.~~]

(6) the amount of time a HUB has participated as a protégé in the program, or in other agencies' programs; and

(7) whether and to what extent the mentor and protégé businesses share management, board members, partners, employees, or other resources that might indicate that they are related or affiliated businesses.

(g) The mentor and the protégé [~~protege~~] should agree on the nature of their involvement under the agency's mentor/protégé [~~protege~~] initiative. Each agency will monitor the process of the relationship. The mentor and protégé [~~protege~~] relationship should be reduced to writing and that agreement may include, but is not limited to, the following:

(1) identification of the developmental areas in which the protégé [~~protege~~] needs guidance;

(2) the time period which the developmental guidance will be provided by the mentor;

(3) name, address, phone and fax numbers, and the points of contact that will oversee the agreement of the mentor and protégé [~~protege~~];

(4) procedure for a mentor firm to notify the protégé [~~protege~~] in advance if it intends to voluntarily withdraw from the program or terminate the mentor-protégé [~~protege~~] relationship;

(5) procedure for a protégé [~~protege~~] firm to notify the mentor in advance if it intends to terminate the mentor-protégé [~~protege~~] relationship; and

(6) a mutually agreed upon timeline to report the progress of the mentor-protégé [~~protege~~] relationship to the state agency.

(h) The protégé [~~protege~~] must maintain its HUB certification status for the duration of the agreement. If a prime contractor [~~contractor/vendor~~] has been awarded a contract with a state agency, which requires a HUB subcontracting plan, and the Mentor-Protégé [~~Protege~~] Agreement is terminated, or the protégé's [~~protege's~~] HUB certification expires, the prime contractor [~~contractor/vendor~~] must either:

(1) enter into a new agreement with a certified HUB protégé [~~protege~~], or

(2) comply with the requirements of this title relating to developing and submitting a HUB subcontracting plan.

(i) Each agency must notify its mentors and protégés [~~proteges~~] that participation is voluntary. The notice must include written documentation that participation in the agency's Mentor-Protégé [~~Protege~~] Program is neither a guarantee for a contract opportunity nor a promise of business; but the program's [~~Program's~~] intent is to foster positive long-term business relationships.

(j) State agencies may demonstrate their good faith under this section by submitting a supplemental letter with documentation to the comptroller [~~commission~~] with their HUB report [~~Report~~] or legislative appropriations request identifying the progress and testimonials of mentors and protégés [~~proteges~~] that participate in the agency's program [~~Program~~]. In accordance with §20.26 [~~§111.26~~] of this title (relating to HUB Coordinator Responsibilities) the agency's HUB coordinator [~~Coordinator~~] shall facilitate compliance by its agency.

(k) Each state agency that sponsors a Mentor-Protégé [~~Protege~~] Program must report that information to the comptroller [~~commission~~] upon completion of a signed agreement by both parties. Information regarding the Mentor-Protégé [~~Protege~~] Agreement shall be reported to the comptroller [~~commission~~] in a form prescribed by the comptroller [~~commission~~] within 21 calendar days after the agreement has been signed. The comptroller [~~commission~~] will register that agreement on the approved list of mentors and protégés [~~proteges~~]. Approved Mentor-Protégé [~~Protege~~] Agreements are valid for all state agencies in determining good faith effort for the particular area of subcontracting to be performed by the protégé [~~Protege~~] as identified in the HUB subcontracting plan.

(l) The comptroller [~~commission~~] shall maintain and make available to state agencies all registered Mentor-Protégé [~~Protege~~] Agreements. The sponsoring agency shall monitor and report the termination of an existing Mentor-Protégé [~~Protege~~] Agreement that has been registered with the comptroller [~~commission~~] within 21 calendar days.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100596

Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 163. COMMUNITY JUSTICE ASSISTANCE DIVISION STANDARDS

37 TAC §163.34

The Texas Board of Criminal Justice (TBCJ) proposes amendments to §163.34, Carrying of Weapons. The proposed amendments are necessary to conform the rule to state and federal law.

Jerry McGinty, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that for each year of the first five years the rule will be in effect, enforcing, or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that, for the first five-year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, is to ensure standards govern community supervision officers' use of weapons.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this rule.

The amendments are proposed under Texas Government Code §509.003 and Texas Occupational Code §1701.257.

Cross Reference to Statutes: Texas Government Code §492.013.

§163.34. Carrying of Weapons.

(a) In accordance with Texas Government Code §76.0051, a community supervision officer (CSO) [~~CSO~~] is authorized to carry a handgun or other firearm while engaged in the actual discharge of the officer's duties [~~only~~] if:

(1) The CSO [~~officer~~] possesses a current certificate of firearms proficiency issued by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE); and

(2) The community supervision and corrections department (CSCD) [~~CSCD~~] director grants [~~and the judges participating in the management of the CSCD grant~~] the authorization.

(b) This section does not authorize a CSO to carry a firearm while off-duty.

(c) The carrying of a handgun or other firearm by CSOs shall be done strictly in accordance with Texas Government Code §76.0051 [~~76.5001~~] and the authorization, policy, and procedures promulgated

by the director [~~Director and judge(s) participating in the management of the CSCD~~] as set forth in subsection (e) of this rule [~~section~~].

(d) Prior to undergoing training to carry a firearm, a CSO shall [~~must~~] meet the following qualifications.

(1) The CSO shall [~~must~~] be examined by a [~~licensed~~] psychologist or psychiatrist licensed in the state of Texas and declared in writing by the psychologist or psychiatrist, using TCLEOSE approved forms, to be in satisfactory psychological and emotional health for the carrying of a weapon in the performance of the CSO's [~~their~~] duties for which a certificate of firearms proficiency is sought.

(2) The CSO shall [~~must~~] execute an instrument wherein the CSO acknowledges:

(A) It [~~it~~] is unlawful for any person to possess any firearm or ammunition who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; or who has been convicted of any domestic violence [~~any~~] crime, misdemeanor, or felony; or who has been discharged from the armed forces under dishonorable conditions;[~~, of domestic violence to possess any firearm or ammunition; and~~]

(B) It [~~it~~] is the CSOs' [~~officer's~~] responsibility to immediately inform their [~~his~~] supervisor and the CSCD director of any arrest, charges, or conviction related to such crimes; and[~~.~~]

(C) The CSO has never been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; has never been convicted of any domestic violence crime, misdemeanor, or felony; or has never been discharged from the armed forces under dishonorable conditions.

(e) Each CSCD that elects to authorize certain, or all, of its CSOs to carry firearms in accordance with the foregoing requirements shall [~~must~~] adopt written policies and procedures defining which of its CSOs [~~officers~~] have authority to carry firearms and the limitations that apply to their carrying and use of firearms. The CSCDs shall submit [~~Such~~] written policies and procedures for review [~~shall be submitted~~] by the Texas Department of Criminal Justice Community Justice Assistance Division (TDCJ CJAD) director. The policies and procedures shall [~~CSCD to CJAD and~~] specify:

(1) The [~~the~~] firearm training and qualification requirements;

(2) The [~~the~~] handling, use, and storage of firearms;

(3) The [~~the~~] types of firearms authorized; and[~~,~~]

(4) The [~~the~~] process for reporting and investigating [~~investigation of~~] incidents related to the possession or use of firearms by the CSOs.

(f) Each CSCD that elects to authorize CSOs to carry or use [~~utilize~~] less than lethal weapons, such as [~~(~~]aerosol sprays, chemical agents, restraining devices, or stun guns, shall [~~etc) must~~] adopt written policies and procedures defining which of its CSOs [~~officers~~] have authority to carry such weapons [~~same~~] and the limitations that apply to their carrying and use. The CSCDs shall submit [~~Such~~] written policies and procedures [~~shall be submitted~~] for review [~~and approval~~] by the TDCJ CJAD [~~TDCJ-CJAD~~] director. The policies and procedures shall specify:

(1) The [~~the~~] training, qualification, and certification requirements;

(2) The [~~the~~] handling, use, and storage of the particular weapons and devices involved;

(3) The [~~the~~] types and relevant specifications that apply to the less than lethal weapons that are authorized; and[~~,~~]

(4) The [~~the~~] process for reporting and investigating [~~investigation of~~] incidents related to the possession or use of less than lethal weapons, such as [~~(~~]aerosol sprays, restraining devices, or [~~devises,~~] stun guns[~~, etc)~~].

(g) CSCDs that elect not to authorize CSOs to carry firearms or use less than lethal weapons in the performance of their duties shall adopt a written policy statement disallowing such practices, as applicable. Each new CSO [~~officer hired~~] shall be notified of these policies prior to an offer of employment by the CSCD.

(h) Requirements of the Texas Commission on Law Enforcement Officer Standards and Education. [~~(TCLEOSE)~~]

(1) The CSOs authorized by the CSCD to make application to the TCLEOSE for certification in firearms proficiency in accordance with the above provisions shall use [~~must utilize~~] TCLEOSE approved forms and provide copies to the TDCJ CJAD [~~both TDCJ-CJAD~~] and the CSCD.

(2) CSCDs shall conduct a comprehensive background check on all CSOs seeking firearms certification.

(3) CSCDs shall maintain records of background information obtained on all CSOs seeking firearms certification.

(4) CSCDs shall maintain records of annually required requalification on all CSOs obtaining firearms certification.

(5) CSCDs shall notify the TCLEOSE if a CSO's authority to carry a firearm is rescinded.

(6) CSCDs authorizing CSOs to carry firearms shall notify the TCLEOSE of the name, address, telephone, and fax numbers of the CSCD director [~~Director~~].

(7) Each CSCD shall allow the TCLEOSE and other law enforcement agencies access to records pertaining to firearms for auditing and investigation purposes.

(i) Community Supervision Officer [~~CSOs~~] Training and Qualification Requirements.

(1) CSOs [~~No CSO~~] shall not be granted permission to carry a firearm in the performance of their duties unless that CSO [~~officer~~] has completed a firearms training program approved by the TCLEOSE and has been issued a certificate of firearms proficiency by the TCLEOSE as provided in subsection (a) of this rule [~~section~~]. The firearms training program shall be completed within six months after obtaining the TCLEOSE psychological release as required in subsection (d)(1) of this rule.

(2) Firearms training provided to CSOs shall be designed to prepare the [~~such~~] CSOs to carry such weapons while [~~in the context of~~] conducting field visits, participating in community based criminal justice initiatives with law enforcement agencies, and in dealing with the safety and self-defense considerations related to such activities.

(3) CSO qualification of weapons usage, a periodic proficiency test, and documentation of training shall be completed in the presence of a TCLEOSE approved instructor [~~done~~] on a yearly basis in addition to the required TCLEOSE certificate of firearms proficiency.

(4) Specific firearms and other weapons training course guidelines and recommendations shall be published in the TDCJ CJAD [~~TDCJ-CJAD~~] Weapons Procedures Guidebook [~~as amended from time to time~~].

(j) Ownership, Inspection, and Maintenance. [~~Handling, Use, and Storage of Firearms~~]

(1) CSOs authorized to carry weapons shall provide their own weapons.

(2) CSCDs shall appoint an individual within the [~~their~~] department to be responsible for yearly inspection and maintenance programs for firearms used by CSOs.

(k) Types of Firearms Authorized.

(1) CSOs are authorized to carry the following weapons:

(A) Double action revolvers [~~Action Revolvers~~]; or

(B) Semi-automatic pistols [~~Pistols~~].

(2) Barrel length of weapon shall [~~must~~] be between two and five inches [~~2" to 5"~~].

(3) Approved cartridges shall be:

(A) 9mm caliber [~~Luger (9x19)~~];

(B) .38 Special;

(C) .357 Magnum;

(D) .357 Sig;

(E) .40 caliber [~~Smith and Wesson~~];

(F) 10mm caliber [~~10 mm Auto~~];

(G) .45 caliber; or [~~Auto;~~]

(H) .380 caliber. [~~Auto~~]

(4) Ammunition. All carried ammunition shall [~~will~~] be factory original loads of bullet weight between 85 and 230 grains, per Sporting Arms Ammunition Manufacturer Institute (SAAMI) Guidelines.

(l) Reports to the Texas Department of Criminal Justice Community Justice Assistance Division. [~~TDCJ-CJAD~~]

(1) Each CSCD shall have a written Use of Force policy and a written procedure for reporting and investigating each incident where a firearm or less than lethal weapon is discharged, used, [~~utilized~~] or drawn on an individual. The term "to draw" means to unholster a firearm in preparation for use in [~~and/or as~~] self-defense against a perceived threat.

(2) Such procedure shall include:

(A) Notification [~~notification~~] of incidents;

(B) Procedures [~~procedures~~] for interaction with outside entities, such as [~~(i.e.,~~] local law enforcement[~~,~~] and media[~~)~~];

(C) Internal [~~internal~~] investigation procedures; and

(D) Employee [~~employee~~] support components.

(3) Notification of Incidents to the Texas Department of Criminal Justice Emergency [~~Justice Emergency~~] Action Center (EAC) [~~(TDCJ-EAC)~~]. Serious incidents, such as a CSO's drawing of a firearm on an individual or the unauthorized use of a less than lethal weapon by a CSO [~~an officer~~], shall be promptly reported to the EAC (936) 437-6600 [~~TDCJ-EAC (936) 437-1448~~] and in all events within 24 hours of the incident. Incidents involving the discharge of a firearm [~~a CSOs shooting of an individual~~] shall be reported to the EAC [~~TDCJ-EAC~~] immediately, if possible, and in all circumstances within three hours of occurrence. A preliminary written report of each of the above-described incidents shall be sent to the TDCJ CJAD [~~CJAD~~] within ten days of the occurrence.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100572
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: March 27, 2011
For further information, please call: (936) 437-6003

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37 TAC §163.46

The Texas Board of Criminal Justice proposes amendments to §163.46, Allocation Formula for Community Corrections Program. The proposed amendments are necessary to clarify the existing procedures.

Jerry McGinty, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that for each year of the first five years the rule will be in effect, enforcing, or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that, for the first five-year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, is to ensure decreases in community corrections program funding do not have an adverse economic impact on community supervision and corrections departments.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under Texas Government Code §509.011.

Cross Reference to Statutes: Texas Government Code §509.003.

§163.46. Allocation Formula for Community Corrections Program.

[~~(a) Purpose. The Texas Government Code §509.011(f), gives the Texas Board of Criminal Justice (TBCJ) discretion to adopt a policy limiting the percentage of benefit or loss that may be realized by a CSCD as a result of the Community Corrections Program allocation formula.~~]

[~~(b)~~] [~~Loss Limits.~~] Assuming sufficient [~~adequate~~] appropriations, no community supervision and corrections department (CSCD) [~~CSCD~~] may incur a funding decrease of more than 5.0% from the previous fiscal year for community corrections program funding. An upper change limit shall be determined based upon [~~by~~] available funding and the size and number of CSCDs [~~departments~~] that reach the loss [~~decrease~~] limit. If appropriations are insufficient so that [~~inadequate to maintain~~] the 5.0% loss [~~decrease~~] limit must be increased, all CSCD allocations shall [~~will~~] be reduced proportionately from the previous year's allocations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100576
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: March 27, 2011
For further information, please call: (936) 437-6003

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CHAPTER 195. PAROLE

37 TAC §195.61

The Texas Board of Criminal Justice proposes amendments to §195.61, concerning the method of payment for parole supervision and administrative fees assessed against offenders under supervision of the Texas Department of Criminal Justice (TDCJ) Parole Division. The proposed amendments add another method for collecting the fee contingent upon the approval of the TDCJ.

Jerry McGinty, Chief Financial Officer for the TDCJ, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that for each year of the first five-year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, is to have offenders pay a fee for the costs of their supervision.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under Texas Government Code §508.182.

Cross Reference to Statutes: Texas Government Code §492.013; Texas Code of Criminal Procedure art. 42.037.

§195.61. Method of Payment for Parole Supervision and Administrative Fees.

The Parole Division shall collect all parole supervision and other administrative fees from offenders released on parole or mandatory supervision required to pay such fees. The method of payment required of such offenders shall be in the form of a money order or certified cashier's check payable to the Texas Department of Criminal Justice or electronic means approved by the department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100574
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: March 27, 2011
For further information, please call: (936) 437-6003

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37 TAC §§195.71 - 195.78

The Texas Board of Criminal Justice proposes amendments to §§195.71 - 195.78, concerning drug and alcohol testing of offenders under supervision of the Texas Department of Criminal Justice (TDCJ) Parole Division. The proposed amendments are non-substantive and clarify the current procedures.

Jerry McGinty, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that for each year of the first five-year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, is to detect an offender's illegal drug use or alcohol use while on supervision.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendments are proposed under Texas Government Code §508.184.

Cross Reference to Statutes: Texas Government Code §492.013.

§195.71. Drug and Alcohol Testing [for ~~Controlled Substances~~].

A parole panel may require as a condition of parole or mandatory supervision that releasees submit to drug and alcohol testing. The [~~a program of testing for controlled substances. Sections 195.72-195.78 of this title (relating to Parole) describe the~~] Parole Division's implementation of such testing is described in 37 Texas Administrative Code §§195.72 - 195.78.

§195.72. Admission of Use Form.

(a) Releasees subject to drug and alcohol testing shall be given an opportunity to admit to the use [~~usage~~] of drugs or alcohol [~~illicit substances~~] and may waive the testing requirement. Releasees shall be informed verbally and in writing that admission of drug or alcohol use [~~illicit substance usage~~] or the detection of use of those [~~illicit~~] substances through testing may result in additional sanctions, including [~~to include~~] revocation. Based on resource availability and releasee compliance, parole officers shall [~~will~~] attempt to secure treatment and counseling services for releasees who have used drugs or alcohol [~~using illicit substances~~]. A releasee, who admits to the use of drugs or alcohol, shall [~~Releasees will~~] acknowledge this fact [~~in writing~~] by signing [~~their name to~~] an Admission of Use [~~admission of use~~] form.

(b) The Admission of Use [~~admission of use~~] form shall [~~will also~~] contain a provision that the releasee authorized the release of [~~per-~~

~~mits~~] the results of testing or the admission of use [~~to be provided~~] to appropriate treatment providers for the sole purpose of providing adequate treatment and counseling services. Testing and admission of use information shall be treated as confidential [~~client~~] information except in circumstances described previously and permitted by the releasee by signed authorization [~~signing the appropriate permission form~~] on the Admission of Use [~~admission of use~~] form.

§195.73. Drug and Alcohol Tests.

Releasees shall be tested for the major drugs of abuse and alcohol in any combination deemed appropriate by the parole officer. The major drugs of abuse include, but are not limited to[~~,~~] amphetamines, barbiturates, cocaine, marijuana, and opiates. A periodic evaluation shall determine the need [~~necessity~~] to change testing patterns and the drugs identified for testing [~~illicit substances to be tested for~~]. All testing shall be completed in accordance with the manufacturer's test instructions.

§195.74. Training.

Staff shall be [~~All testing shall be conducted by staff~~] trained to competently and accurately test specimens [~~utilize~~] and interpret the test results [~~testing equipment and supplies available~~].

§195.75. Chain of Custody.

The Parole Division shall document the chain of custody when submitting specimens for confirmation testing. In addition:

(1) [~~(a)~~] Collection of the [~~It must be assured that the urine~~] specimen shall be observed and analyzed in the presence of the releasee [~~was voided by the offender~~] being supervised. The specimen shall be accurately labeled. [~~This has ramifications of adequate witness and security of specimen containment. Accurate labeling of samples is critical.~~]

(2) [~~(b)~~] Samples shall not be [~~The voided sample must not have been~~] tampered with prior to analysis or confirmation testing [~~procedures~~].

(3) Samples not sent for confirmation testing shall be properly discarded by the offender submitting the specimen.

(4) [~~(c)~~] When the [~~Where~~] transfer of a specimen is required, the specimen shall [~~specimens are called for, samples must~~] remain secured and refrigerated or stored in accordance with the manufacturer's instructions if the [~~be kept under refrigeration when~~] analysis [~~time~~] is delayed.

(5) [~~(d)~~] The analysis procedure shall use [~~used must utilize~~] quality control measures that withstand expert [~~bear up under the~~] scrutiny [~~of expert critique~~]. Suppliers [~~The supplier~~] of equipment or testing supplies must be able to provide oversight personnel with technical data on the functions and limitations of their products [~~abilities and restrictions of its instrumentation~~].

§195.76. Safety.

The Parole Division shall develop adequate infection control and safety precautions in the administration of the drug and alcohol testing program.

§195.77. Data Collection.

The Parole Division shall collect [~~provide for~~] data [~~collection~~] for statistical analysis and evaluation of the drug and alcohol testing program.

§195.78. Procedural Manual.

The Parole Division shall develop a procedural manual for drug and alcohol testing that incorporates the [~~policy~~] requirements as described in 37 Texas Administrative Code §§195.71 - 195.77 [~~of the Texas Board of Criminal Justice~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100571
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: March 27, 2011
For further information, please call: (936) 437-6003

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 108. DIVISION FOR EARLY CHILDHOOD INTERVENTION SERVICES

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), proposes amendments, new rules, and repeals to the DARS rules in Title 40, Part 2, Chapter 108, Division for Early Childhood Intervention Services. This proposal amends Subchapter D, General Provisions for Case Management Services for Infants and Toddlers with Developmental Disabilities, repeals all of Subchapter E, Developmental Rehabilitation Services, and adds a new Subchapter E, Specialized Skills Training. DARS proposes the repeal of §§108.401, 108.407, 108.413, and 108.415; the amendment of §§108.403, 108.405, 108.409, and 108.411; new §§108.404, 108.406, 108.407, 108.415, and 108.417; the repeal and replacement of §§108.501, 108.503, and 108.505 and new §108.507, concerning Division for Early Childhood Intervention Services.

Specifically, DARS proposes to re-title Subchapter D as Case Management for Infants and Toddlers with Developmental Disabilities. DARS also proposes amendments and repeals to the following provisions of Subchapter D: repeal §108.401, Introduction, to remove language that is redundant or inconsistent with the Medicaid state plan; amend §108.403, Definitions, by removing duplicative definitions and clarifying others; add new §108.404, Recipient Eligibility for Early Childhood Intervention (ECI) Case Management Services, to relocate information on eligibility criteria from §108.407, which is being simultaneously proposed for repeal and replacement; amend §108.405, Reimbursable Services, by updating language for consistency with the Medicaid state plan and re-titling as Case Management Services; add new §108.406, Parent Refusal, to add procedures for when parents refuse case management; repeal §108.407, Recipient Eligibility for Early Childhood Intervention (ECI) Case Management Services, to remove language that is duplicative of language in Subchapter A (relating to Early Childhood Intervention Service Delivery), and replace it with a new §108.407, Medicaid Service Limitations, to relocate information from §108.405; amend §108.409, Conditions for Case Management Provider Participation, by removing language that is duplicative of other

applicable laws and re-titling as Conditions for Case Management Provider Agency Participation; amend §108.411, Qualified Personnel, by updating terminology from "case managers" to "service coordinators", specifying a contractor's responsibilities related to service coordinators, and re-titling as Assignment of Service Coordinator; repeal §108.413, Retention of Records, to remove language that is duplicative of language in Subchapter B (relating to Procedural Safeguards and Due Process Procedures); repeal §108.415, Provider Records, to remove records requirements that are not specific to case management services, and replace it with new §108.415, Documentation, to clarify documentation requirements specific to case management services; and add new §108.417, Due Process, to clarify family rights.

DARS further proposes to add the following new rules in new Subchapter E, Specialized Skills Training: §108.501, Specialized Skills Training (Developmental Services), to describe the criteria for authorization and delivery of specialized skills training and the associated documentation requirements; §108.503, Recipient Eligibility, to describe the eligibility requirements for a child to receive specialized skill training; §108.505, Conditions for Provider Participation, to describe criteria for a provider to be reimbursed for the delivery of specialized skills training; and §108.507, Due Process, to clarify family rights.

DARS additionally proposes to repeal the following subchapter and sections in Title 40, Chapter 108: Subchapter E, Developmental Rehabilitation Services, §108.501, Reimbursable Services; §108.503, Recipient Eligibility for Services Funded by the Developmental Rehabilitation Services Program; and §108.505, Conditions for Provider Participation in the Developmental Rehabilitation Services Program.

The proposed rule changes are authorized by the Texas Human Resources Code, Chapters 73 and 117; and the Individuals with Disabilities Education Act, as amended, 20 U.S.C. §1400 et seq. and its implementing regulations, 34 C.F.R. Part 303, as amended.

Ellen Baker, Acting DARS Chief Financial Officer, has determined that for each year of the first five years that the proposed amendments and new rules will be in effect, there are no foreseeable fiscal implications for state or local governments costs or revenues as a result of enforcing or administering the amendments and new rules.

Ms. Baker also has determined that for each year of the first five years the proposed amendments, new rules, and repeals will be in effect, the public benefit anticipated as a result of enforcing the changes will be improved quality of the Medicaid services delivered to families resulting from clearer communication of requirements to contractors and increased information available to families concerning their rights to services. Ms. Baker has also determined that there is no probable economic cost to persons who are required to comply with the proposed amendments and new rules.

Further, in accordance with Texas Government Code, §2001.022, Ms. Baker has determined that the proposed amendments, new rules, and repeals will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Ms. Baker has determined that the proposed amendments, new rules, and repeals will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendments, new rules, and repeals may be submitted within 60 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756 or electronically to Nancy.Mikulencak@dars.state.tx.us.

SUBCHAPTER D. GENERAL PROVISIONS FOR CASE MANAGEMENT SERVICES FOR INFANTS AND TODDLERS WITH DEVELOPMENTAL DISABILITIES

40 TAC §§108.401, 108.407, 108.413, 108.415

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.401. Introduction.

§108.407. Recipient Eligibility for Early Childhood Intervention (ECI) Case Management Services.

§108.413. Retention of Records.

§108.415. Provider Records

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100587
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 424-4050

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SUBCHAPTER D. CASE MANAGEMENT FOR INFANTS AND TODDLERS WITH DEVELOPMENTAL DISABILITIES

40 TAC §§108.403 - 108.407, 108.409, 108.411, 108.415, 108.417

The amendments and new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.403. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

[(1) Assessment--The ongoing procedures used by appropriate qualified personnel throughout the period of a child's eligibility to identify:]

[(A) the child's unique needs and strengths;]

[(B) the family's strengths and needs related to their child's development; and]

[(C) the nature and extent of intervention services needed by the child and the family in order to assess subparagraphs (A) and (B) of this paragraph.]

[(2) Caregiver--A person, such as a parent, foster parent, grandparent, child-care worker, who has responsibilities for the care of a child.]

(1) [(3)] Case management--In compliance with §108.405 of this subchapter (relating to Case Management Services), case management means services [Services] provided to assist an eligible child and their family [individuals] in gaining access to the rights and procedural safeguards under the Individuals with Disabilities Education Act, Part C, and to needed medical, social, educational, developmental, and other appropriate services.

[(4) Case manager (service coordinator)--An Early Childhood Intervention (ECI) local program staff person who is assigned to a child and family, who is the single contact point for families, and who is responsible for assisting and empowering families in accessing services and coordinating those services.]

[(5) Developmental delay--A significant variation in normal development in one or more of the following areas as measured and determined by appropriate diagnostic instruments and procedures by an interdisciplinary team and by informed clinical opinion: cognitive development; physical development, including vision and hearing, gross and fine motor skills, and nutrition status; communication development; social and emotional development; and adaptive development or self-help skills.]

(2) [(6)] Developmental disability--Children from birth to age three who have substantial developmental delay or specific congenital or acquired conditions with a high probability of resulting in developmental disabilities if services are not provided.

(3) Monitoring and reassessment--Activities and contacts as described in §108.405 of this subchapter (relating to Case Management Services) that are necessary to ensure that the individualized family service plan (IFSP), as defined in §108.17 of this chapter (relating to Individualized Family Service Plan (IFSP)), is effectively implemented and that the planned services adequately address the needs of the child.

(4) Service coordinator--An employee of an ECI contractor who meets the criteria described in Subchapter C of this chapter (relating to Early Childhood Intervention Staff Qualifications).

[(7) ECI--The Texas Early Childhood Intervention Program.]

[(8) Individualized Family Service Plan (IFSP)--A written plan, developed by the interdisciplinary team, based on all assessment and evaluation information and including the family's description of their strengths and needs, which outlines the intervention services for the child and the child's family.]

[(9) Monitoring--Periodic tracking, observation and follow up to ensure that services have been delivered, that services have been delivered on a timely basis, and that the services are addressing the clients' needs. Monitoring and follow up activities are conducted as needed and are documented in the child's case folder.]

[(10) Needs assessment--The needs assessment is conducted and documented by the case manager in conjunction with the Medicaid client's family. The documentation lists medical, social, nutritional, educational, developmental, and other appropriate needs of the Medicaid client. Individuals found not to be eligible for early intervention services, or whose families choose not to enroll in early intervention services are to be referred to any appropriate alternative care or services.]

[(11) Plan of care--Information gathered from the comprehensive needs assessment is incorporated into an Individualized Family Service Plan of care (IFSP). With family consent, family concerns, priorities and resources are identified and documented in the plan. The plan summarizes assessment results, includes the services necessary to enhance the development of the child and the capacity of the family to meet the child's unique needs, and must be coordinated with other service providers involved in delivery of services to the child and family.]

[(12) Reassessment and Transition Planning--A reassessment of the client's progress and needs is conducted at least every six months. The case manager documents the reassessment in the client's case folder. At reassessment the case manager will determine if modifications to the service plan are necessary and if the level of involvement by the case manager should be adjusted. When services are no longer needed, or the child no longer qualifies for services, the case manager facilitates the planning, coordination, and transition to other appropriate care.]

[(13) Service coordination--Through linkage, coordination, facilitation, assistance, anticipatory guidance, and the provision of information about the child's medical needs to other health care providers, the case manager ensures the recipient's access to the care, resources and services to meet the client's needs. The case manager may assist the family in making applications for services, confirm service delivery dates with ECI staff, providers and supports, and assist the family with scheduling needs. The case manager assists the family in taking responsibility for ensuring that services are performed, and works with medical providers, ECI staff, and other community resources to coordinate care.]

(5) [(14)] Texas Health Steps--The name adopted by the State of Texas for the federally mandated Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program. [It includes the State's Comprehensive Care Program extension to EPSDT.]

[(15) Time and Financial Information (TAFI)--A combined cost report and time study report, collected quarterly from providers.]

§108.404. Recipient Eligibility for Early Childhood Intervention (ECI) Case Management Services.

In order to receive ECI case management services, the recipient must meet the criteria established in §108.7 of this chapter (relating to Client Eligibility), have an identified need for case management, and agree to receive services.

§108.405. Case Management [Reimbursable] Services.

(a) Case management means services provided to assist an eligible child and their family in gaining access to the rights and procedural safeguards under Part C, and to needed medical, social, educational, developmental, and other appropriate services. Case management includes:

(1) coordinating the performance of evaluations and assessments;

(2) facilitating and participating in the development, review, and evaluation of the individualized family service plan as defined in §108.17 of this chapter (relating to Individualized Family Service Plan (IFSP)) which is based upon the child's applicable history, the parent's input, and the results of all evaluations and assessments;

(3) assisting families in identifying available service providers and making appropriate referrals to obtain services from medical, social, and educational providers to address identified needs and achieve goals specified in the IFSP;

(4) following up with families to assist the child with timely access to services, discuss the disposition of the referral with the family, and determine if the services have met the child's needs;

(5) monitoring and reassessment of the delivery of and effectiveness of services through contacts with the child, family members, service providers, or other entities or individuals and conducted as frequently as necessary and at least once every six months to determine if:

(A) services are being provided in accordance with the child's IFSP;

(B) services are adequate; and

(C) when the child has new needs or there are changes in the needs of the child, the IFSP and service arrangements are adjusted to address the identified needs.

(6) informing families of the availability of advocacy services;

(7) coordinating with medical and other health providers;

(8) facilitating the child's transition to preschool or other appropriate services; and

(9) documenting, in accordance with §108.415 of this subchapter (relating to Documentation), all case management activities, the child and family response to case management, whether the child and family have declined any services in the plan, and coordination with other case management providers.

[(a) Targeted Case management services are reimbursable to Medicaid providers who meet the conditions for provider participation as specified in §108.409 of this subchapter (relating to Conditions for Case Management Provider Participation). Reimbursable case management services include contacts with the child's caregiver on behalf of the child, or with other service providers or professionals on behalf of the child, for the purpose of assisting that child in gaining access to needed medical, social, educational, developmental, and other appropriate services.]

(b) Case management may be delivered face to face or by telephone. [Case management services are not reimbursable as Medicaid services when another payor is liable for payment or if case management services are associated with the proper and efficient administration of the state plan. Case management services associated with the following are not payable as optional targeted case management services under Medicaid:]

(1) Contacts are billable to Medicaid when the interaction is directly with the child, and/or the child's parent as defined in 20 U.S.C. §1401. [Medicaid eligibility determinations and redeterminations;]

(2) Contacts may be made with other individuals when directly related to identifying the eligible child's needs, helping the eligible child access services, identifying needs and supports to assist the eligible child in obtaining services, providing the service coordinator with useful feedback, and alerting the service coordinator to changes in the eligible child's needs. These contacts must be documented in the child's record but are not separately billable to Medicaid. [Medicaid eligibility intake processing;]

[(3) Medicaid preadmission screening;]

[(4) Prior authorization for Medicaid services;]

[(5) Required Medicaid utilization review;]

[(6) Texas Health Steps program administration;]

[(7) Medicaid "lock-in" provided for under the Social Security Act, §1915(a);]

[(8) Services that are an integral or inseparable part of another Medicaid service;]

[(9) Outreach activities that are designed to locate individuals who are potentially eligible for Medicaid; and]

[(10) Any medical evaluation, examination, or treatment billable as a distinct Medicaid-covered benefit. However, referral arrangements and staff consultation for such services are reimbursable as case management services.]

§108.406. Parent Refusal.

(a) A parent may refuse case management provided by the ECI contractor. If the parent refuses case management activities, the service coordinator must:

(1) document the parent's choice in the child's record;

(2) provide the IDEA Part C required services during the pre-enrollment period, including scheduling and coordinating screenings, evaluations, and assessments;

(3) coordinate the development, review, and evaluation of the Individualized Family Service Plan (IFSP), including any reviews, revisions, and the annual IFSP; and

(4) provide and obtain all the accompanying required notices and consents.

(b) When the parent refuses case management services, the ECI contractor must not submit a claim for case management to Medicaid.

§108.407. Medicaid Service Limitations.

Case management services are not reimbursable as Medicaid services when another payor is liable for payment or if case management services are associated with the proper and efficient administration of the state plan. Case management services associated with the following are not payable as optional targeted case management services under Medicaid:

(1) Medicaid eligibility determinations and redeterminations;

(2) Medicaid eligibility intake processing;

(3) Medicaid preadmission screening;

(4) prior authorization for Medicaid services;

(5) required Medicaid utilization review;

(6) Texas Health Steps program administration;

(7) Medicaid "lock-in" provided for under the Social Security Act, §1915(a);

(8) services that are an integral or inseparable part of another Medicaid service;

(9) outreach activities that are designed to locate individuals who are potentially eligible for Medicaid; and

(10) any medical evaluation, examination, or treatment billable as a distinct Medicaid-covered benefit. However, referral arrangements and staff consultation for such services are reimbursable as case management services.

§108.409. Conditions for Case Management Provider Agency Participation.

In order to be reimbursed for [~~Early Childhood Intervention (ECI)~~] services [~~as~~] specified in §108.405 of this subchapter (relating to Case Management Service [~~Reimbursable Services~~]), a provider must:

(1) be an Early Childhood Intervention contractor of the Department of Assistive and Rehabilitative Services [~~certified by the Texas ECI program as meeting the standards for service providers established by the Texas Early Childhood Intervention Program Services, as specified in this chapter~~];

(2) comply with all applicable federal and state laws and regulations governing the services provided;

(3) ensure that services are provided by [~~appropriately~~] qualified staff as specified in Subchapter C of this chapter (relating to Early Childhood Intervention Staff Qualifications); and [~~§108.411 of this subchapter (relating to Qualified Personnel);~~]

(4) be responsible for the service coordinator's compliance with this subchapter. [~~enrolled and approved for participation as a provider in the Texas Medical Assistance (Medicaid) Program;~~]

~~[(5) sign a written provider agreement with ECI or its designee;]~~

~~[(6) comply with the terms of the provider agreement and all requirements of the Texas Medical Assistance Program, including regulations, rules, handbooks, standards, and guidelines published by ECI or its designee; and]~~

~~[(7) bill for services covered by the Texas Medical Assistance Program in the manner and format prescribed by ECI or its designee.]~~

§108.411. Assignment of Service Coordinator [~~Qualified Personnel~~].

(a) Early Childhood Intervention (ECI) case management services must be provided by service coordinators [~~case managers~~] who meet the educational and work experience requirements, commensurate with their job responsibilities, as specified in Subchapter C of this chapter (relating to Early Childhood Intervention Staff Qualifications) [~~§108.407 of this subchapter (relating to Recipient Eligibility for Early Childhood Intervention (ECI) Case Management Services); staff qualifications standards developed by the Department; and who have also completed the ECI Case Management Curriculum~~].

(b) The ECI contractor is responsible for:

(1) assigning one service coordinator for each eligible child and the child's family according to the following:

(A) an initial service coordinator must be assigned at the time of referral; and

(B) a new service coordinator may be assigned at the time the IFSP is developed or the original service coordinator may be retained, if appropriate;

(2) ensuring that the service coordinator assigned by the ECI contractor has a combination of education and experience relevant to the child's needs; and

(3) appointing a new service coordinator if requested by the parent.

§108.415. Documentation.

Case Management Documentation. Documentation of each case management contact must include the name of the child, the names of the ECI contractor and assigned service coordinator, the date, time, duration and place of service, type of service (face to face or telephone), a description of the contact including all referrals made and the disposition of the referral, any relevant information provided by the family, or other individual or entity and the service coordinator's signature.

§108.417. Due Process.

(a) Medicaid-eligible individuals. Any Medicaid-eligible individual whose request for eligibility for case management is denied or is not acted upon with reasonable promptness, or whose case management has been terminated, suspended, or reduced is entitled to a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A (relating to Uniform Fair Hearing Rules).

(b) All individuals. If an ECI contractor denies, involuntarily reduces, or terminates case management for an individual, the individual has all rights to file complaints, request mediation, or request a hearing in accordance with Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) and in accordance with Chapter 101 of this title (relating to Administrative Rules and Procedures), Subchapter J, Division 3.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100588
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 424-4050

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SUBCHAPTER E. DEVELOPMENTAL REHABILITATION SERVICES

40 TAC §§108.501, 108.503, 108.505

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.501. Reimbursable Services.

§108.503. Recipient Eligibility for Services Funded by the Developmental Rehabilitation Services Program.

§108.505. Conditions for Provider Participation in the Developmental Rehabilitation Services Program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100589
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 424-4050

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SUBCHAPTER E. SPECIALIZED SKILLS TRAINING

40 TAC §§108.501, 108.503, 108.505, 108.507

The new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.501. Specialized Skills Training (Developmental Services).

(a) Specialized skills training (developmental services) are rehabilitative services to promote age-appropriate development by providing skills training to correct deficits and teach compensatory skills for deficits that directly result from medical, developmental or other health-related conditions.

(b) Services must:

(1) be designed to create learning environments and activities that promote the child's acquisition of skills in one or more of the following developmental areas: physical/motor, communication, adaptive, cognitive, social/emotional and sensory;

(2) include skills training and anticipatory guidance for family members, or other significant caregivers to ensure effective treatment and to enhance the child's development;

(3) be provided in the child's natural environment, as defined in 34 CFR Part 303, unless the criteria listed at 34 CFR §303.167 are met and documented in the case record; and

(4) be provided on an individual or group basis.

(c) In addition to the criteria in subsection (b) of this section, group services must be:

(1) recommended by the interdisciplinary team and documented on the IFSP, only when participation in the group will assist the child reach the outcomes in the IFSP;

(2) planned as part of an IFSP that also contains individual services; and

(3) be limited to no more than four children and their parent(s) or other significant caregiver(s).

(d) Staff Qualifications. Specialized skills training must be provided by an Early Intervention Specialist as defined in §108.3 of this chapter (relating to Definitions).

(e) Service Authorization.

(1) Specialized skills training must be recommended by an interdisciplinary team that includes a physician or licensed practitioner of the healing arts and be documented in an Individualized Family Service Plan (IFSP) as defined in §108.17 of this chapter (relating to Individualized Family Service Plan (IFSP)).

(2) Services must be monitored at least once every six months to determine if services are reducing the child's functional limitations, promoting age appropriate growth and development, and are responsive to the family's identified goals for the child. Monitoring should occur as part of the IFSP review and must be documented in the case record.

(f) Documentation. Documentation of each specialized skills training contact must include:

(1) the name of the child;

(2) the name of the ECI contractor and Early Intervention Specialist;

(3) the date, time, duration and place of service;

(4) type of service (individual or group);

(5) a description of the contact including a summary of activities and the family or primary caregiver's level of involvement;

(6) the IFSP goal which was the focus of the intervention;

(7) the child's progress;

(8) relevant new information about the child provided by the family or other significant caregiver; and

(9) the Early Intervention Specialist's signature.

§108.503. Recipient Eligibility.

In order to receive ECI specialized skills training; the child must meet the following criteria:

(1) eligibility criteria established in §108.7 of this chapter (relating to Client Eligibility), and

(2) have a need for specialized skills training as determined by the interdisciplinary team and identified on the IFSP which has been signed by a physician or licensed professional of the healing arts.

§108.505. Conditions for Provider Agency Participation.

In order to be reimbursed for services specified in §108.501 of this subchapter (relating to Specialized Skills Training (Developmental Services)), a provider must:

(1) be an Early Childhood Intervention contractor of the Department of Assistive and Rehabilitative Services;

(2) comply with applicable federal and state laws and regulations governing the services provided;

(3) ensure that services are provided by an Early Intervention Specialist defined in §108.3 of this chapter (relating to Definitions); and

(4) be responsible for the Early Intervention Specialist's compliance with this subchapter.

§108.507. Due Process.

(a) Medicaid-eligible individuals. Any Medicaid-eligible individual whose request for eligibility for specialized skills training is denied or is not acted upon with reasonable promptness, or whose specialized skills training has been terminated, suspended, or reduced is entitled to a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A (relating to Uniform Fair Hearing Rules).

(b) All individuals. If an ECI contractor denies, involuntarily reduces, or terminates specialized skills training for an individual, the individual has all rights to file complaints, request mediation, or request a hearing in accordance with Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) and in accordance with Chapter 101, Subchapter J, Division 3 of this title (relating to Administrative Rules and Procedures).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100590
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 424-4050

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CHAPTER 109. OFFICE FOR DEAF AND HARD OF HEARING SERVICES
SUBCHAPTER F. DEAF AND HARD OF HEARING DRIVER IDENTIFICATION PROGRAM

40 TAC §§109.601, 109.603, 109.605, 109.607, 109.609, 109.611

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), proposes to add to its rules in Title 40, Part 2, Chapter 109, Office for Deaf and Hard of Hearing Services, new Subchapter F, Deaf and Hard of Hearing Driver Identification Program, §§109.601, 109.603, 109.605, 109.607, 109.609, and 109.611, for the Office for Deaf and Hard of Hearing Services.

DARS is proposing to add new Subchapter F to establish rules to govern its compliance with Texas Human Resources Code Chapter 81, §81.019, which requires DARS to design and provide for the issuance of a symbol or other form of identification that may be attached to a motor vehicle regularly operated by a person who is deaf or hard of hearing.

These new rules are being proposed under the authority of Texas Human Resources Code, Chapter 81, §1 and §117.

Ellen Baker, DARS Acting Chief Financial Officer, estimates that for each year of the first five years that the proposed new rules are in effect, there will be no foreseeable fiscal implications for state or local governments' costs or revenues as a result of enforcing or administering the proposed rules. She has determined that there is no probable economic cost to persons who are required to comply with the proposed rules.

Ms. Baker also has determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated as a result of enforcing the rules will be the establishment of a program that assists deaf and hard of hearing drivers and law enforcement authorities to better communicate with each other and an improvement of public safety for all citizens.

Additionally, in accordance with Texas Government Code §2001.022, Ms. Baker has determined that the proposed rules will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Ms. Baker has also determined that the proposed rules will have no adverse economic effect on small businesses or micro-businesses.

Written comments on this proposal may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756.

The new rules are proposed pursuant to HHSC's statutory rulemaking authority under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§109.601. Purpose.

The purpose of this subchapter is to set out the organization, administration, and other general procedures and practices governing the operation of the Deaf and Hard of Hearing Driver Identification Program, which provides for the design and issuance of a symbol or other form of identification that may be displayed in or on a motor vehicle that is operated by a person who is deaf or hard of hearing.

§109.603. Statutory Authority.

The Deaf and Hard of Hearing Driver Identification Program is created under authority of the Texas Human Resources Code, Chapter 81, §81.019.

§109.605. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Applicant--A person applying for a Visor Identification Card with the department.

(2) Application--The form the department's Office for Deaf and Hard of Hearing Services uses to gather and document information about an applicant for a Visor Identification Card under the and Hard of Hearing Driver Identification Program.

(3) Consumer--A person who is deaf or hard of hearing and who applies for services or programs administered by the department.

(4) Department--Texas Department of Assistive and Rehabilitative Services.

(5) DHHS or Office--The department's Office for Deaf and Hard of Hearing Services.

(6) Program or DIdP--Deaf and Hard of Hearing Driver Identification Program.

(7) Visor Identification Card--The visor card issued by the Department's Office for Deaf and Hard of Hearing Services to an eligible driver who is deaf or hard of hearing for use in a motor vehicle operated by that driver.

§109.607. Eligibility.

(a) To be eligible for a Visor Identification Card, an applicant must:

(1) be a resident of Texas;

(2) have a current, valid driver's license issued by a state agency authorized to issue such driver's licenses;

(3) be a person with a disability that impairs the person's ability to hear; and

(4) submit a completed application to DHHS, along with any requested documentation and any applicable application fee.

(b) An applicant for a Visor Identification Card may be required by the department or DHHS to provide acceptable proof that the applicant is deaf or hard of hearing. Acceptable proof may include, but is not limited to the following:

(1) medical proof that the individual is deaf or hard of hearing;

(2) a state issued driver's license that indicates notice that the license holder is deaf or hard of hearing; and

(3) certification by a licensed physician or licensed audiologist that the driver is an individual with a hearing loss severe enough to possibly impede communication in some traffic stops.

(c) Eligibility for a Visor Identification Card shall be determined by DHHS and the determination shall be final.

§109.609. Deaf and Hard of Hearing Driver Visor Identification Card.

(a) DHHS is responsible for the design and content of the Visor Identification Card.

(b) DHHS shall issue all Visor Identification Cards.

(c) The Visor Identification Card shall document the name of the driver to whom it is issued and contain a department-designated driver registration number.

(d) DHHS shall maintain a registry of all holders of Visor Identification Cards.

(e) The department, through DHHS, may set a fee for each symbol or other form of identification to defray the costs of administering the DIdP.

§109.611. Consumer Confidentiality.

DHHS shall maintain confidentiality of all applicant or consumer information it receives relating to the program, in accordance with all applicable state laws.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100599
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 27, 2011
For further information, please call: (512) 424-4050

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 360. MEDICAID BUY-IN PROGRAM

1 TAC §360.117

The Texas Health and Human Services Commission withdraws the proposed amendment to §360.117 which appeared in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9584).

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100500
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: February 8, 2011
For further information, please call: (512) 424-6900

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 183. ACUPUNCTURE

22 TAC §183.2

The Texas Medical Board withdraws the proposed amendment to §183.2 which appeared in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9210).

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100509
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: February 8, 2011
For further information, please call: (512) 305-7016

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 163. LICENSURE

22 TAC §163.13

The Texas Medical Board (Board) adopts amendments to §163.13, concerning Expedited Licensure Process, without changes to the proposed text as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10801) and will not be republished.

The amendment deletes language that requires applicants for an expedited license to practice medicine to submit proof of eligibility for a visa immigration waiver.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §155.1025, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100507
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: February 28, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 305-7016

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CHAPTER 171. POSTGRADUATE TRAINING PERMITS

22 TAC §171.2, §171.5

The Texas Medical Board (Board) adopts amendments to §171.2, concerning Construction, and §171.5, concerning Duties of PIT Holders to Report. Section 171.2 is adopted without changes to the proposed text as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10802) and will not be republished. Section 171.5 is adopted with changes to the proposed text as published in the December 10, 2010, issue of the *Texas Register.* The text of the rule will be republished.

The amendment to §171.2 removes reference to "annual" reporting requirements since annual reports are no longer required under §171.5.

The amendment to §171.5 clarifies that fines, citations, or violations that are over $250 must be reported, excluding traffic tickets unless the traffic violations relate to the use of alcohol or drugs.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendments are also authorized by §153.001, Texas Occupations Code.

§171.5. Duties of PIT Holders to Report.

(a) Failure of any PIT holder to comply with the provisions of this chapter or the Medical Practice Act §160.002 and §160.003 may be grounds for disciplinary action as an administrative violation against the PIT holder.

(b) The PIT holder shall report in writing to the executive director of the board the following circumstances within thirty days of their occurrence:

(1) the opening of an investigation or disciplinary action taken against the PIT holder by any licensing entity other than the TMB;

(2) an arrest; a fine, citation or violation over $250 (excluding traffic tickets, unless drugs or alcohol were involved); charge or conviction of a crime; indictment; imprisonment; placement on probation; or receipt of deferred adjudication; and

(3) diagnosis or treatment of a physical, mental or emotional condition, which has impaired or could impair the PIT holder's ability to practice medicine.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100508
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: February 28, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 305-7016

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CHAPTER 183. ACUPUNCTURE

22 TAC §183.3

The Texas Medical Board (Board) adopts amendments to §183.3, concerning Meetings, with changes to the proposed text as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10802) and will be republished.

The amendment provides that committee minutes are to be approved by the full Board rather than by committee which is required under Robert's Rules of Order.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §205.201, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

§183.3. Meetings.

(a) The acupuncture board may meet up to four times a year to carry out the mandates of the Act.

(b) Special meetings may be called by the presiding officer of the acupuncture board, by resolution of the acupuncture board, or upon written request to the presiding officer of the acupuncture board signed by at least three members of the board.

(c) Acupuncture board and committee meetings shall, to the extent possible, be conducted pursuant to the provisions of Robert's Rules of Order Newly Revised unless, by rule, the acupuncture board adopts a different procedure.

(d) All elections and any other issues requiring a vote of the acupuncture board shall be decided by a simple majority of the members present. A quorum for transaction of any business by the acupuncture board shall be one more than half the acupuncture board's membership at the time of the meeting. If more than two candidates contest an election or if no candidate receives a majority of the votes cast on the first ballot, a second ballot shall be conducted between the two candidates receiving the highest number of votes.

(e) The acupuncture board, at a regular meeting or special meeting, may elect from its membership an assistant presiding officer and a secretary-treasurer to serve a term of one year or for a term of a set duration established by majority vote of the acupuncture board.

(f) The acupuncture board, at a regular meeting or special meeting, upon majority vote of the members present may remove the assistant presiding officer or secretary-treasurer from office.

(g) The following are standing and permanent committees of the acupuncture board. Each committee, with the exception of the Executive Committee, shall consist of at least one board member who is a licensed physician, one board member who is a licensed acupuncturist, and one public board member. In the event that a committee does not have a representative of one or more of these groups, the presiding officer shall appoint additional members as necessary to maintain this composition. The Executive Committee shall include the presiding officer, the assistant presiding officer, and the secretary-treasurer, plus additional members so that the committee consists of a minimum of two board members who are licensed acupuncturists, one board member who is a licensed physician, and one public board member. The responsibilities and authority of these committees shall include those duties and powers as set forth below and such other responsibilities and authority which the acupuncture board may from time to time delegate to these committees.

(1) Licensure Committee:

(A) draft and review proposed rules regarding licensure, and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(B) draft and review proposed application forms for licensure, and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(C) oversee the application process for licensure;

(D) receive and review applications for licensure;

(E) make determinations of eligibility, present the results of reviews of applications for licensure and make recommendations to the acupuncture board regarding licensure of applicants;

(F) oversee and make recommendations to the acupuncture board regarding any aspect of the examination process including the approval of an appropriate licensure examination and the administration of such an examination and documentation and verification of records from all applicants for licensure;

(G) draft and review proposed rules regarding any aspect of the examination;

(H) maintain communication with Texas acupuncture schools;

(I) make recommendations to the acupuncture board regarding matters brought to the attention of the Licensure Committee.

(2) Discipline and Ethics Committee:

(A) draft and review proposed rules regarding the discipline of acupuncturists and enforcement of Subchapter H of the Act;

(B) oversee the disciplinary process and give guidance to the acupuncture board and staff regarding methods to improve the disciplinary process and more effectively enforce Subchapter H of the Act;

(C) monitor the effectiveness, appropriateness, and timeliness of the disciplinary process;

(D) make recommendations regarding resolution and disposition of specific cases and approve, adopt, modify, or reject recommendations from staff or representatives of the acupuncture board regarding actions to be taken on pending cases. Approve dismissals of complaints and closure of investigations;

(E) draft and review proposed ethics guidelines and rules for the practice of acupuncture, and make recommendations to the acupuncture board regarding the adoption of such ethics guidelines and rules;

(F) make recommendations to the acupuncture board and staff regarding policies, priorities, budget, and any other matters related to the disciplinary process and enforcement of Subchapter H of the Act; and

(G) make recommendations to the acupuncture board regarding matters brought to the attention of the Discipline and Ethics Committee.

(3) Education Committee:

(A) draft and propose rules regarding educational requirements for licensure in Texas and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(B) draft and propose rules regarding training required for licensure in Texas and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(C) draft and propose rules regarding continuing education requirements for renewal of a Texas license and make recommendations to the acupuncture board regarding changes or implementation of such rules;

(D) consult with the Texas Higher Education Coordinating Board regarding educational requirements for schools of acupuncture, oversight responsibilities of each entity, degrees which may be offered by schools of acupuncture;

(E) maintain communication with acupuncture schools;

(F) plan and make visits to acupuncture schools at specified intervals, with the goal of promoting opportunities to meet with the students so they may become aware of the board and its functions;

(G) develop information regarding foreign acupuncture schools in the areas of curriculum, faculty, facilities, academic resources, and performance of graduates;

(H) draft and propose rules which would set the requirements for degree programs in acupuncture;

(I) be available for assistance with problems relating to acupuncture school issues which may arise within the purview of the board;

(J) offer assistance to the Licensure Committee in determining eligibility of graduates of foreign acupuncture schools for licensure;

(K) study and make recommendations regarding documentation and verification of records from foreign acupuncture schools;

(L) make recommendations to the acupuncture board regarding matters brought to the attention of the Education Committee.

(4) Executive Committee:

(A) review agenda for board meetings;

(B) ensure records are maintained of all committee actions;

(C) review requests from the public to appear before the board and to speak regarding issues relating to acupuncture;

(D) review inquiries regarding policy or administrative procedures;

(E) delegate tasks to other committees;

(F) take action on matters of urgency that may arise between board meetings;

(G) assist the medical board in the organization, preparation, and delivery of information and testimony to the Legislature and committees of the Legislature;

(H) formulate and make recommendations to the board concerning future board goals and objectives and the establishment of priorities and methods for their accomplishment;

(I) study and make recommendations to the board regarding the role and responsibility of the board offices and committees;

(J) study and make recommendations to the board regarding ways to improve the efficiency and effectiveness of the administration of the board pursuant to the Occupations Code, §205.102(b);

(K) make recommendations to the board regarding matters brought to the attention of the executive committee.

(h) Meetings of the acupuncture board and of its committees are open to the public unless such meetings are conducted in executive session pursuant to the Open Meetings Act and the Act. In order that board meetings may be conducted safely, efficiently, and with decorum, members of the public shall refrain at all times from smoking or using tobacco products, eating, or reading newspapers and magazines. Members of the public may not engage in disruptive activity that interferes with board proceedings, including, but not limited to, excessive movement within the meeting room, noise or loud talking, and resting of feet on tables and chairs. The public shall remain within those areas of the board's offices designated as open to the public. Members of the public shall not address or question board members during meetings unless recognized by the board's presiding officer pursuant to a published agenda item.

(i) Journalists have the same right of access as other members of the public to acupuncture board meetings conducted in open session, and are also subject to the rules of conduct described in subsection (h) of this section. Observers of any board meeting may make audio or visual recordings of such proceedings conducted in open session subject to the following limitations: the acupuncture board's presiding officer may request periodically that camera operators extinguish their artificial lights to allow excessive heat to dissipate; camera operators may not assemble or disassemble their equipment while the board is in session and conducting business; persons seeking to position microphones for recording board proceedings may not disrupt the meeting or disturb participants; journalists may conduct interviews in the reception area of the board's offices or, at the discretion of the acupuncture board's presiding officer, in the meeting room after recess or adjournment; no interview may be conducted in the hallways of the board's offices; and the acupuncture board's presiding officer may exclude from a meeting any person who, after being duly warned, persists in conduct described in this subsection and subsection (h) of this section.

(j) The assistant presiding officer of the acupuncture board shall assume the duties of the presiding officer in the event of the presiding officer's absence or incapacity.

(k) In the absence or incapacity of both the presiding officer and the assistant presiding officer, the secretary-treasurer shall assume the duties of the presiding officer.

(l) In the event of the absence or incapacity of the presiding officer, the assistant presiding officer, and secretary-treasurer, the members of the acupuncture board may elect another member to act as the presiding officer of a board meeting or may elect an interim acting presiding officer for the duration of the absences or incapacity or until another presiding officer is appointed by the governor.

(m) Upon the death, resignation, or permanent incapacity of the assistant presiding officer or the secretary-treasurer, the acupuncture board shall elect from its membership an officer to fill the vacant position. Such an election shall be conducted as soon as practicable at a regular or special meeting of the acupuncture board.

(n) Committee minutes shall be approved by the full board with a quorum of the committee members present to vote on approval of the minutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100510
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: February 28, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 305-7016

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22 TAC §183.15, §183.20

The Texas Medical Board (Board) adopts amendments to §183.15, concerning Use of Professional Titles, and §183.20, concerning Continuing Acupuncture Education, without changes to the proposed text as published in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9210) and will not be republished.

The amendment to §183.15 describes when and how a licensee may use additional professional titles in advertising and other related materials.

The amendment to §183.20 clarifies that to become an approved CAE provider, the provider must submit to the Board evidence that the provider has three continuous years of previous experience providing at least one different CAE course in Texas in each of those years.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §205.201, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100511
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: February 28, 2011
Proposal publication date: October 15, 2010
For further information, please call: (512) 305-7016

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CHAPTER 187. PROCEDURAL RULES

The Texas Medical Board (Board) adopts amendments to §§187.8, 187.14, 187.27, 187.55, and 187.59, concerning Procedural Rules, without changes to the proposed text as published in the December 24, 2010, issue of the *Texas Register* (35 TexReg 11471) and will not be republished.

The amendment to §187.8, concerning Subpoenas, establishes that the party requesting the Board to issue a subpoena in relation to a case filed at the State Office of Administrative Hearings (SOAH) is responsible for accomplishing service of the subpoena.

The amendment to §187.14, concerning Informal Resolution of Disciplinary Issues Against a Licensee, provides that if the licensee fails to accept an offer of settlement by the Quality Assurance Committee, or if the licensee requests that an Informal Settlement Conference (ISC) be held, the offer shall be deemed to be rejected and an ISC shall be held which is the current process. The current language says that an ISC is to be scheduled rather than "held."

The amendment to §187.27, concerning Written Answers in SOAH Proceedings and Default Orders, amends the process for issuance of default orders. Under the adopted language if a licensee fails to timely file a response in a SOAH case, SOAH may, at Board staff's request, remand the case to the Board and the Board will then rule on the staff attorney's motion for default and issue a default order if warranted. This differs from the current process that requires the Board's general counsel to make a determination of default before the case may be remanded by SOAH.

The amendment to §187.55, concerning Purpose, makes grammatical changes.

The amendment to §187.59, concerning Evidence, provides that documentary evidence for temporary suspension hearings with notice must be prefiled with the Board 24 hours prior to the scheduled hearing. Admission of documentary evidence after the 24 hours shall be admitted only upon a showing of good cause. In addition, documentary evidence must be submitted in electronic format in all cases where the Respondent has been provided notice that a panel member will be appearing by phone.

No comments were received regarding adoption of the amendments.

SUBCHAPTER A. GENERAL PROVISIONS AND DEFINITIONS

22 TAC §187.8

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100512

Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: February 28, 2011
Proposal publication date: December 24, 2010
For further information, please call: (512) 305-7016

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SUBCHAPTER B. INFORMAL BOARD PROCEEDINGS

22 TAC §187.14

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100513
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: February 28, 2011
Proposal publication date: December 24, 2010
For further information, please call: (512) 305-7016

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SUBCHAPTER C. FORMAL BOARD PROCEEDINGS AT SOAH

22 TAC §187.27

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100514
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: February 28, 2011
Proposal publication date: December 24, 2010
For further information, please call: (512) 305-7016

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SUBCHAPTER F. TEMPORARY SUSPENSION PROCEEDINGS

22 TAC §187.55, §187.59

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100515
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: February 28, 2011
Proposal publication date: December 24, 2010
For further information, please call: (512) 305-7016

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PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 277. PRACTICE AND PROCEDURE

22 TAC §277.6

The Texas Optometry Board adopts amendments to §277.6 without change to the proposed text published in the December 3, 2010, issue of the *Texas Register* (35 TexReg 10580).

The amendments change the recommended amount for administrative penalties and fines.

No comments were received.

The amendment is adopted under the Texas Optometry Act, Texas Occupations Code, §§351.151, 351.551, 351.552, 351.507, and 351.522. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession, The Board interprets §351.551 and §351.552 as authorizing the imposition of administrative penalties by the Board according to provisions set out in the Act, and §351.507 and §351.522, to require the Board to publish a standardized penalty schedule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100548

Chris Kloeris
Executive Director
Texas Optometry Board
Effective date: March 3, 2011
Proposal publication date: December 3, 2010
For further information, please call: (512) 305-8502

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER T. SCHOOL-BASED HEALTH CENTERS

25 TAC §§37.531 - 37.538

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §§37.531 - 37.538, concerning school-based health centers (SBHC), without changes to the proposed text as published in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9464) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The purpose of these sections is to establish rules for awarding grants to assist school districts with the costs of establishing and operating SBHCs and to establish standards for the funded centers. The amendments reflect changes to Texas Education Code, Chapter 38, resulting from the passage of House Bill (HB) 281, 81st Legislature, Regular Session, 2009, that would broaden applicant eligibility and prohibit awarding funds to not-for-profit organizations that offer reproductive services; update terminology to match current school health and school district industry practices; and update language to align with the current Texas Education Code.

School-based health centers are established by a school district or by community partners in conjunction with a school district or districts at one or more campuses within the school district to deliver primary and preventative health care programs and services for students and their families and prevent emerging health threats that are specific to the district. The department, formerly the Texas Department of Health, started voluntary funding for SBHCs in 1993 and in 1999, 76th Regular Legislative Session, HB 1, and subsequent appropriations acts, created a competitive grant program, and provided start-up funding for SBHCs. These provisions are now codified in Texas Education Code, Chapter 38.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 37.531 - 37.538 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Section 37.531 concerns the purpose and allows for procedures for awarding grants to applicants and reflects changes resulting from passage of House Bill 281.

Section 37.532 concerns the definitions and specifically defines an applicant to reflect change resulting from passage of House Bill 281, updates current health and school health industry terminology and aligns with Texas Education Code language.

Section 37.533 concerns the number of awards and aligns the section with the Texas Education Code.

Section 37.534 concerns the dollar amount of awards per biennium and added "as required by law" at the end of the sentence to define how this requirement was originated.

Section 37.535 concerns matching funds and revised rule text by deleting the word "obtained" and adding the word "secured" to clarify word usage.

Section 37.536 concerns the competitive request for proposals process and replaced the word "accord" with "accordance" to correct grammar.

Section 37.537 concerns the guidelines for requests for proposals and reflects change resulting from passage of House Bill 281 regarding entities ineligible for grants.

Section 37.538 concerns the standards for school-based health centers and updates current health and school health industry terminology and aligns the section with the Texas Education Code; removes the district as the sole recipient for services provided by the SBHC and eliminates restrictions for when the funds should be used; eliminates the requirement for a SBHC sustainability plan after SBHC funding ends; clarifies which entity is responsible for securing written parental consent for "provision of student services;" allows a SBHC to coordinate with health care providers regardless of community size or location; removes specific language about who will be compensated for services to SBHCs; requires SBHCs to conduct, and not just facilitate client surveys; requires SBHCs to deliver services designed to increase student health through preventive health measures; and requires annual reports.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments are authorized by the Texas Education Code, §38.063, which requires rules establishing standards for health care centers funded through grants; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100569
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: March 6, 2011
Proposal publication date: October 22, 2010
For further information, please call: (512) 458-7111 x6972

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CHAPTER 97. COMMUNICABLE DISEASES
SUBCHAPTER A. CONTROL OF COMMUNICABLE DISEASES

25 TAC §97.11, §97.14

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §97.11, concerning notification of emergency medical personnel and others of possible exposure to methicillin-resistant *Staphylococcus aureus* (MRSA), and §97.14, concerning a program for reporting MRSA, a bacteria primarily associated with skin and soft tissue infections. The rules are adopted without changes to the proposed text as published in the December 17, 2010, issue of the *Texas Register* (35 TexReg 11166), and the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments to §97.11 are necessary to comply with Government Code, §607.102, which was added by the 81st Legislature to add MRSA to diseases requiring notification of emergency medical personnel and others under certain circumstances.

The amendments to §97.14 are necessary to comply with Chapter 369 (House Bill 1362), 81st Legislature, Regular Session, 2009, which amends Health and Safety Code, §81.0445, and requires the department to conduct a pilot program for reporting MRSA. A health authority that demonstrates an interest and possesses the resources to conduct the program will manage the pilot program.

The department is required to select a local health authority to administer the program established by §97.14. The program would require: (1) all clinical reference and hospital laboratories within the area served by the local health authority to report all persons with MRSA infections; (2) an evaluation of the cost and feasibility of adding MRSA infections to the reportable disease list; (3) the collection of data and analysis of findings regarding the prevalence of MRSA infections; and (4) compiling and making available to the public a summary of the program. Not later than September 1, 2011, the department shall submit to the Legislature a report concerning the effectiveness of the program in tracking and reducing the number of MRSA infections.

SECTION-BY-SECTION SUMMARY

The amendment to §97.11(b) changes the list of diseases, to include MRSA, that require a hospital to notify a first responder of exposure to the disease, when the hospital believes an exposure to the disease has occurred. The amendment to §97.14(c) identifies that the MRSA pilot program will be conducted by health authorities serving Angelina, Fort Bend and McLennan counties. The amendment to §97.14(e) establishes the time period, March 1, 2011 through March 31, 2011 for reporting MRSA infection by laboratories and physicians in the three counties. The amendment to §97.14(f) revises the expiration date of the rule from September 1, 2009 to September 1, 2011.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §81.004, which gives the commissioner of the department general statewide responsibility for the administration of the Communicable Disease Act and authorizes the adoption of rules necessary for its effective administration and implementation; Health and Safety Code, §81.0445, which requires the Executive Commissioner of the Health and Human Services Commission to develop rules to establish a pilot program to research and implement procedures for reporting cases of MRSA; Health and Safety Code, §81.048, which requires the department to designate the diseases requiring notification under that section; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of the Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2011.

TRD-201100495
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: February 28, 2011
Proposal publication date: December 17, 2010
For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER PP. ANNUITY DISCLOSURES

28 TAC §§3.9701 - 3.9712

The Commissioner of Insurance (Commissioner) adopts new Subchapter PP, §§3.9701 - 3.9712, concerning disclosures pertaining to annuities. Sections 3.9702, 3.9703, 3.9706, and 3.9708 - 3.9711 are adopted with changes to the proposed text published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6924). Sections 3.9701, 3.9704, 3.9705, 3.9707, and 3.9712 are adopted without changes.

REASONED JUSTIFICATION. These rules are necessary to require insurers to provide annuity applicants and contract owners with necessary information regarding annuities. The purpose of the required disclosures is to provide consumers with educational and identifying information regarding annuities that will enable them to make a decision that is more likely in their best interest and to reduce the opportunity for misrepresentation and incomplete disclosure. On April 15, 2010, the Department posted on its website the proposed rule text and cost note estimates for informal comment. On April 26, 2010, the Department held a public meeting to receive comments relating to the informal rule text and cost note estimates. These rules are based on the National Association of Insurance Commissioners (NAIC) Annuity Disclosure Model Regulation.

The sections apply to all group and individual annuity contracts and certificates unless specifically excepted by the rules. The rules require that insurers provide specific disclosures to both annuity applicants and annuity contract owners. The disclosures required under the sections consist of a report to contract owners on at least an annual basis and a disclosure document and a buyer's guide for annuity applicants. The report to contract owners provides consumers with information regarding the current status of their contract and changes that have occurred to their account since the inception of their contract or their last report. The buyer's guide provides annuity applicants with educational information regarding annuity types and features. The disclosure document provides annuity applicants with information regarding the features and restrictions of a particular annuity product. The rules specify that if the required buyer's guide and disclosure document are not provided to an applicant at or before the time of application, a free look period of at least 15 calendar days beginning upon contract receipt must be provided during which the applicant may return the contract without penalty.

The following statutes provide the authority for the new subchapter. The Insurance Code §1108.002 provides that for the purpose of regulation under the Insurance Code, an annuity contract is considered an insurance policy or contract if the annuity contract is issued by a life, health, or accident insurance company, including a mutual company or fraternal benefit society, or issued under an annuity or benefit plan used by an employer or individual. Under the Insurance Code §101.051(b)(1), an insurer that makes or proposes to make an insurance contract is engaging in the business of insurance in this state. The Insurance Code §101.051(b)(3) specifies that taking or receiving an insurance application constitutes the business of insurance in this state. The Insurance Code §101.051(b)(5)(A) specifies that issuing or delivering a contract to a resident of this state constitutes the business of insurance. The Insurance Code §31.002 specifies in pertinent part that in addition to other required duties, the Department shall regulate the business of insurance in this state and ensure that the Insurance Code and other laws regarding insurance and insurance companies are executed. The Insurance Code §36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state. Because the new subchapter applies to annuities issued by life, health, or accident insurance companies, including a mutual company or fraternal benefit society, or issued under an annuity or benefit plan used by an employer or individual, the subchapter regulates annuities that are considered insurance contracts for the purpose of regulation under the Insurance Code pursuant to the Insurance Code §1108.002. The acts that trigger the requirements of the new subchapter are the taking of an annuity application and an insurer's issuance of an annuity contract. Both of these acts are expressly listed among the acts that constitute the business of insurance under the Insurance Code §101.051(b). Therefore, because the new subchapter applies to annuities that constitute insurance contracts for the purpose of the Insurance Code, and because the acts that trigger the requirements of the new subchapter are expressly listed in the Insurance Code as acts constituting the business of insurance, the Department has the authority to adopt the new subchapter pursuant to the Insurance Code §§31.002 and 36.001. Sections 1108.002, 101.051(b)(1), 101.051(b)(3) and 101.051(b)(5)(A) specify business transactions and subject matters for which the Commissioner is authorized pursuant to the Insurance Code §36.001 to adopt necessary and appropriate rules. It is the Department's position that the provision of basic educational and identifying information relating to annuities is necessary to effectively regulate the sale of annuities in this state.

In addition to this authority, §1152.005 and §1114.007 of the Insurance Code provide rulemaking authority for certain transactions that will be regulated under the new rules and specific types of annuities that will be subject to the new rule requirements and procedures. The Insurance Code §1152.005 specifies that the Commissioner may adopt rules that are fair, reasonable, and appropriate to augment and implement the Insurance Code Chapter 1152, relating to separate accounts and variable annuity contracts, including rules establishing agent licensing, standard policy provisions, and disclosures. Although the new rules will apply to all types of annuities and not just variable annuity contracts, §1152.005 expressly authorizes the Commissioner to adopt rules relating to disclosures for variable annuities. Additionally, in the context of annuity replacement transactions, the Commissioner has specific authority to promulgate rules pertaining to: (i) regulating the actions of insurers and agents concerning annuity replacement transactions; (ii) ensuring that purchasers receive information with which a decision in the purchaser's best interest may be made; and (iii) reducing the opportunity for misrepresentation and incomplete disclosure. The Insurance Code §1114.007 specifies that the Commissioner may adopt reasonable rules in the manner prescribed by Chapter 36, Subchapter A, to accomplish and enforce the purpose of Chapter 1114. The Insurance Code §1114.001 in pertinent part states that the purpose of Chapter 1114 is to regulate the activities of insurers and agents with respect to the replacement of existing annuities; protect the interests of purchasers of annuities by establishing minimum standards of conduct to be observed in certain transactions; ensure that purchasers receive information with which a decision in the purchaser's best interest may be made; reduce the opportunity for misrepresentation and incomplete disclosure; and establish penalties for failure to comply with the requirements adopted under Chapter 1114. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to imple-

ment the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

No public hearing on the rule proposal was requested. In response to written comments on the published proposal, the Department has changed some of the proposed language in the text of the rule as adopted. The Department has also made non-substantive changes for purposes of clarification. Additionally, this adoption includes minor editorial corrections to two sections. None of the changes made to the proposed text, however, either as a result of comments or necessary clarification, materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The following changes are made to the proposed text as a result of comments.

As a result of comments, proposed §3.9702(b)(1) is revised to read "immediate and deferred annuities that contain no non-guaranteed elements" rather than the proposed language that read "immediate and deferred annuities that contain only guaranteed elements." A commenter pointed out that annuities that have no non-guaranteed elements but do contain determinable elements would be excluded by the proposed language. Excluding from the applicability of the rules those annuities that contain determinable elements but no guaranteed elements was not the intent of the Department. Therefore, the proposed language has been revised as suggested.

As a result of comments, the Department changed proposed §3.9703 to provide that the rule applies only to annuity transactions that occur on or after the date that is six months after the effective date of the rule. The Department recognizes that insurers will need time to comply with the new regulations, including time to update computer systems and training manuals, develop and/or update application forms and disclosure documents, as well as conduct agent training to ensure compliance with the new rules. Therefore, §3.9703 as adopted is revised to read "This subchapter shall apply only to annuity transactions subject to regulation under this subchapter that occur on or after the date that is six months after the effective date of this subchapter."

As a result of comments, the Department has also made changes to proposed §3.9708(d) to allow insurers that have the technical capability to deliver buyer's guide and disclosure documents via the Internet in lieu of delivering hard copies of these documents. As adopted, §3.9708(d) clarifies that the delivery of the buyer's guide and disclosure documents through the insurer's website is not a requirement, but rather an optional method to satisfy the general requirement to provide the necessary documents to the prospective applicant. The subsection as adopted reads: "(d) If the application is received through the Internet, and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website which are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document shall be deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application."

In addition to the change made to proposed §3.9708 as the result of comments on proposed §3.9708(d), the Department has added new §3.9708(f) as a result of comments on proposed §3.9702. The new §3.9708(f) exempts insurer's receiving an application for private placement contracts as defined by the Insurance Code §1152.110(a) from the requirement to provide the buyer's guide specified in §3.9710. This change is in response to a comment on proposed §3.9702 in which the commenter recommends that private placement contracts involving accredited investors be exempt from the entire subchapter. The commenter states that buyers of private placement contracts are sophisticated investors and Securities Exchange Commission (SEC) rules do not require a prospectus for private placement contracts. Therefore, the commenter suggests the consumer notices required in proposed §3.9708 serve no purpose. The Department agrees that accredited investors are more sophisticated purchasers and do not need every protection that is designed for the more unsophisticated consumers. The Department, however, declines to revise §3.9702 by excepting private placement contracts altogether from the applicability of the rules and instead has added the new subsection (f) to §3.9708 to except private placement contracts from the buyer's guide requirement. This change is consistent with the intent of the rules to balance the consumer protection interests of accredited investors while still ensuring that those investors are provided sufficient information to make a fully informed investment decision. Section 3.9708(f) as adopted reads: "Insurers receiving an application for private placement contracts as defined by the Insurance Code §1152.110(a) are not required to provide the buyer's guide specified in §3.9710 of this subchapter."

A new subsection (g) has been added to proposed §3.9708 as a result of comments. A commenter recommended deleting "If the buyer's guide and disclosure document required by this subchapter are not provided at or before the time of application." The commenter states that §3.9711(a) is vague and could be interpreted to provide a safe harbor to insurers who as a routine matter already provide a 15-day free look period. The Department disagrees with the commenter's suggestion to delete part of §3.9711(a) and has instead added a new subsection (g) to §3.9708 to clarify that insurers have an independent duty to provide consumer notices, and that the consumer notice requirements apply even if the insurer provides a 15-day free look period prior to the adoption of these rules. Section 3.9708(g) as adopted reads: "This section applies regardless of whether an insurer is providing a 15-day free look period like that required in §3.9711(a) of this subchapter (relating to Free Look Period) prior to the adoption of this subchapter or whether the insurer begins providing the 15-day free look period in accordance with §3.9711(a) of this subchapter."

Also, as a result of a comment, proposed §3.9709 is revised to delete the language in §3.9709(a)(13) "that is reasonably intelligible to the average consumer." Two commenters stated that this language is subjective and not defined, and that proposed §3.9709(b) includes a requirement that the disclosure document be written in language understandable by the typical person to which the disclosure is directed. The Department agrees with the commenter, and §3.9709(a)(13) as adopted reads in pertinent part: "information about the current guaranteed rate for new contracts that contains a clear notice that the rate is subject to change."

Proposed §3.9709(a) has been revised to clarify that elements in paragraphs (1) - (13) are only necessary "if applicable." This change is another response to a previously discussed comment in which the commenter recommends that private placement contracts involving accredited investors be exempt from the entire subchapter. In response to this comment, the Department has instead clarified that a document that contains the required

elements of §3.9709 for a disclosure document provide the minimum amount of information necessary to the prospective applicant. Therefore, the typical prospectus or other similar documents that are commonly provided to a private placement contract applicant would be sufficient. Adding the language "if applicable" clarifies that a disclosure document does not need to address issues that are not relevant to the particular annuity product being sold. Section 3.9709(a) as adopted reads: "At a minimum, the following information, if applicable, must be included in the disclosure document required to be provided under this subchapter..."

Finally, as a result of a multiple comments pertaining to the buyer's guide for variable annuities, proposed §3.9710 is revised. Two commenters suggested that until the NAIC has adopted a buyer's guide for variable annuities that no buyer's guide be distributed. One commenter suggested that until the NAIC Buyer's Guide for Variable Annuities has been published, the Department require the Security and Exchange Commission's document "Variable Annuities: What You Should Know." The revised §3.9710 requires no buyer's guide for variable annuities for the first year the rule is effective, and then if there is not yet a NAIC buyer's guide for variable annuities, the Security and Exchange Commission's document "Variable Annuities: What You Should Know" must be provided. The requirement in proposed §3.9710 that the NAIC buyer's guide for fixed annuities is required for prospective buyers of equity-indexed annuities if there is not yet a NAIC buyer's guide specific to equity-index annuities remains unchanged in the adoption.

The Department has also made changes for purposes of clarification to §§3.9709(c), 3.9711(b), and 3.9711(e).

The Department has changed proposed §3.9709(c), relating to the identification of the documents that satisfy the requirements of §3.9709 for disclosure documents, to clarify the Department's intent that subsection (c) does not limit the Commissioner's ability to enforce not only subsection (c) but the other provisions of the section as well. Therefore, the word "other" is added in the sentence in §3.9709(c), that reads: "This subsection does not limit the commissioner's ability to enforce the *other* provisions of this section or require the use of a FINRA-approved disclosure document."

The Department has changed proposed §3.9711(b), related to the required notice of the free look period, to clarify the Department's intent that the required notice must prominently disclose the information concerning the 15-day free look period. Therefore, the phrase "information concerning" is added in the sentence in §3.9711(b), that reads: "The notice must prominently disclose *information concerning* the 15-day free look period."

The Department has changed proposed §3.9711(e), related to the free look periods applicability to accredited investors, to clarify the Department's intent that the refund and free look period requirements do not apply to only subsection (e) but to other provisions of the section as well. Therefore, the word "subsection" is replaced with the word "section." The revised §3.9711(e) reads: "The refund and free look period requirements in this *section* do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the United States Securities and Exchange Commission."

The Department has also made minor editorial changes to §3.9706(a) and §3.3709(a)(1) to: (i) correct the improper use of internal references; and (ii) correct improper punctuation.

Section 3.9706(a) is revised to correct the reference to "chapter" to "subchapter." The intent of defining the term "guaranteed element" is to define the term for usage only in the subchapter and not for the entire chapter. Therefore, the subsection as adopted reads in pertinent part: "For the purposes of this *subchapter* "guaranteed element means..." This correction also makes §3.9706(a) internally consistent with the parallel provision in §3.9706(b).

Section 3.9709(a)(1) is revised to correctly punctuate the series of three elements of information with semi-colons because one of the elements contains a comma.

The following is a section-by-section summary of the new sections and the reasons for their adoption.

§3.9701. Purpose. The rules are necessary to provide standards for the disclosure of certain minimum information about annuity contracts and to assist purchasers of annuity contracts to understand basic features of annuity contracts. Section 3.9701 sets forth this purpose.

§3.9702. Applicability and Scope. Section 3.9702 is necessary to specify the types of annuity contracts and certificates that are subject to the new rules. Section 3.9702(a) specifies that the subchapter applies to all group and individual annuity contracts and certificates, except as provided in §3.9702(b). Section 3.9702(b) specifies that except as provided in §3.9702(c), the subchapter does not apply to certain annuity products. Section 3.9702(b)(1) specifies that the subchapter does not apply to immediate and deferred annuities that contain no non-guaranteed elements. Section 3.9702(b)(2) specifies that the subchapter does not apply to annuities used to fund: (i) an employee pension plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.); (ii) a plan described by the Internal Revenue Code of 1986 §§401(a), 401(k), or 403(b), in which the plan, for purposes of the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.), is established or maintained by an employer; (iii) a governmental or church plan as defined by the Internal Revenue Code of 1986 §414, or a deferred compensation plan of a state or local government or a tax-exempt organization under the Internal Revenue Code of 1986 §457; (iv) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor; or (v) prepaid funeral benefits, as defined by the Finance Code Chapter 154. Section 3.9702(b)(3) specifies that the subchapter does not apply to a structured settlement annuity. Section 3.9702(b)(4) specifies that the subchapter does not apply to a charitable gift annuity qualified under the Insurance Code Chapter 102. Section 3.9702(b)(5) specifies that the subchapter does not apply to a funding agreement. Section 3.9702(c) provides that notwithstanding the exemptions specified in §3.9702(b), the subchapter applies to an annuity used to fund a plan or arrangement that is funded solely by contributions an employee elects to make, whether on a pre-tax or after-tax basis, under certain specified conditions. These conditions are: (i) if the insurer has been notified that plan participants may choose from among two or more fixed annuity providers; and (ii) there is a direct solicitation of an individual employee by an agent for the purchase of an annuity contract. As used in the subsection, "direct solicitation" does not include a meeting held by an agent solely for the purpose of educating or enrolling employees in the plan or arrangement.

§3.9703. Effective Date. Section 3.9703 provides that the rules apply only to annuity transactions subject to regulation under the subchapter that occur on or after six months after the effective

date of the rule as adopted. This delayed effective date is necessary because of cost and compliance concerns of insurers.

§3.9704. Definitions. Section 3.9704 defines the words and terms used in the rules. It provides that these terms have the same meaning as provided in the Insurance Code Chapter 102. The section defines the terms *agent, buyer's guide, contract owner, disclosure document, funding agreement, generic name, and structured settlement annuity.*

§3.9705. Determinable Elements. Section 3.9705(a) specifies that for the purpose of the subchapter, the term *determinable elements* means elements derived from processes or methods that are guaranteed at issue and are not subject to company discretion, but for which the values or amounts cannot be determined until some point after issue. The subsection specifies that the term includes: (i) premiums; (ii) credited interest rates, including any bonus; (iii) benefits; (iv) values; (v) non-interest based credits; (vi) charges; and (vii) elements of formulas used to determine any element described by paragraphs (1) - (6) of the subsection. This definition and examples are necessary to ensure proper compliance with the subchapter. The definition and examples are used in defining the terms *guaranteed element* and non-guaranteed element that are defined in §3.3906. Section 3.9705(b) specifies that determinable elements may be described as guaranteed but not determined at issue, and that an element is considered determinable if the element was computed from only underlying determinable elements, or from both determinable and guaranteed elements.

§3.9706. Guaranteed and Non-guaranteed Elements. Section 3.9706(a) specifies that for the purposes of the subchapter, *guaranteed element* means an element listed in subsection (a)(1) - (7) of §3.9705 that is guaranteed and determined at issue. The subsection specifies that an element is considered guaranteed if all of the underlying elements used in its computation are guaranteed. Section 3.9706(b) specifies that for the purposes of the subchapter, "non-guaranteed element" means an element listed in subsection (a)(1) - (7) of §3.9705 that is subject to the insurer's discretion and is not guaranteed at issue, and that an element is considered non-guaranteed if any underlying elements used in its computation is non-guaranteed.

§3.9707. Effect on Other Law. Section 3.9707 provides that compliance with the subchapter is not a defense in any action brought by or for the Department alleging a violation of the Insurance Code, or, except for this subchapter regulating annuity disclosures, any rule adopted pursuant to the Insurance Code.

§3.9708. Required Consumer Notices. To achieve the purpose of the rules, it is necessary for the Department to mandate certain consumer notices and the minimum requirements for these notices. Section 3.9708(a) specifies that if an application for an annuity contract or certificate is taken in a face-to-face meeting, the applicant must be given at or before the time of application both a disclosure document and the appropriate buyer's guide specified in §3.9710 of the subchapter. Section 3.9708(b) specifies that if the application is taken by means other than in a face-to-face meeting the applicant must be sent not later than the fifth business day after the date on which the completed application is received by the insurer both a disclosure document and the appropriate buyer's guide specified in §3.9710 of the subchapter. Section 3.9708(c) specifies that if the insurer receives the application as a result of a direct solicitation through the mail, the insurer providing the appropriate buyer's guide and a disclosure document in a mailing inviting prospective applicants to apply for an annuity contract or certificate satisfies the requirement in §3.9708(b) that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application. Section 3.9708(d) specifies that if the application is received through the Internet, and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website which are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document are deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application. Section 3.9708(e) specifies that a solicitation for an annuity contract that is provided in a manner other than a face-to-face meeting must include a statement that the proposed applicant may contact the insurer for a free annuity buyer's guide. Section 3.9708(f) specifies that applications for private placement contracts do not require a buyer's guide as described in §3.9710. Section 3.9708(g) specifies that §3.9708 applies whether or not a free look period is provided under §3.9711.

§3.9709. Disclosure Document. Section 3.9709 specifies the minimum requirements for the disclosure document required under the subchapter. Section 3.9709(a) specifies that the following minimum information, if applicable, must be included in the required disclosure document: (i) the generic name of the contract; the insurer product name, if different from the generic name; the product's form number; and a statement of the fact that the contract is an annuity; (ii) the insurer's name and address; (iii) a description of the contract and the benefits provided under the contract that emphasizes the long-term nature of the contract and the inclusion of examples of the long-term nature as appropriate; (iv) the guaranteed, non-guaranteed, and determinable elements of the contract, any limitations of those elements, and an explanation of how those elements operate; (v) an explanation of the initial crediting rate, specifying any bonus or introductory portion, the duration of the initial crediting rate, and the fact that rates may change from time to time and are not guaranteed; (vi) periodic income options, both on a guaranteed and non-guaranteed basis; (vii) any value reductions caused by withdrawals from or surrender of the contract; (viii) how values in the contract can be accessed; (ix) the death benefit, if available, and how the death benefit is computed; (x) a summary of the federal tax status of the contract and any penalties applicable on withdrawal of values from the contract; (xi) the impact of any rider, such as a long-term care rider; (xii) a list of the specific dollar amount or percentage charges and fees, with an explanation of how those charges and fees apply; and (xiii) information about the current guaranteed rate for new contracts that contains a clear notice that the rate is subject to change.

Section 3.9709(b) requires an insurer to define terms used in the disclosure document in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure document is directed. This provision is intended to require insurers to craft disclosures relevant to the intended market for the particular product discussed in the disclosure. For example, a product intended for senior citizens or retirees may have a disclosure document printed in larger font to facilitate easier reading.

Section 3.9709(c) specifies that a disclosure document that complies with the Financial Industry Regulatory Authority (FINRA) Conduct Rules and the United States Securities and Exchange Commission prospectus requirements satisfies the requirements of the section for disclosure documents. Section 3.9709(c) fur-

ther specifies that the subsection does not limit the commissioner's ability to enforce the other provisions of the section or require the use of a FINRA-approved disclosure document. Additionally, under §3.9709(c), a safe harbor is provided for an annuity contract that is regulated by, and complies with, the FINRA Conduct Rules and the SEC prospectus requirements pertaining to disclosure.

§3.9710. Buyer's Guide. Section 3.9710 provides that for the purposes of the subchapter, an appropriate buyer's guide is the latest version of the buyer's guide adopted by the NAIC that applies to the particular type of annuity (such as fixed deferred annuity, equity-indexed annuity, or variable annuity) that is the subject of the transaction. The section specifies that if the NAIC has not adopted a buyer's guide for variable annuities, then no buyer's guide is required until one year after the date on which this subchapter becomes effective. If the NAIC has not adopted a buyer's guide for variable annuities within one year after the date on which this subchapter becomes effective, then for purposes of this subchapter the appropriate buyer's guide is the latest version of the SEC's Office of Investor Education and Advocacy "Variable Annuities: What You Should Know", SEC Pub. 011.

§3.9711. Free Look Period. To achieve the purposes of the rules, it is necessary for the Department to mandate a free look period in certain circumstances. Section 3.9711 is necessary to specify the provisions relating to the free look period required in certain circumstances. Section 3.9711(a) specifies that if the required buyer's guide and the disclosure document are not provided at or before the time of application, a free look period of at least 15 calendar days must be provided during which the applicant may return the contract without penalty. Section 3.9711(b) requires that notice of the free look period required under the section be provided to consumers in a notice that is included on or attached to the cover page of the delivered annuity contract, and that the notice must prominently disclose information concerning the 15-day free look period. Section 3.9711(c) specifies that the free look period begins the date the consumer receives the contract and runs concurrently with any other free look period required under the Texas Administrative Code, the Texas Insurance Code, or another law of this state. Section 3.9711(d) specifies that an unconditional refund without penalty for purposes of the section for variable or modified guaranteed annuity contracts means a refund equal to the cash surrender value provided in the annuity contract, plus any fees or charges deducted from the premiums or imposed under the contract. Section 3.9711(e) specifies that the refund and free look period requirements in the section do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the United States Securities and Exchange Commission. This exemption is consistent with the Department's determination that accredited investors are more sophisticated purchasers and therefore do not need every protection designed for more unsophisticated consumers.

§3.9712. Report to Contract Owners. Section 3.9712 specifies the provisions relating to the report to contract owners. Section 3.9712(a) requires, for annuities in the payout period with changes in non-guaranteed elements and for the accumulation period of a deferred annuity, the insurer to provide each contract owner with a report, at least annually, on the status of the contract. Section 3.9712(b) specifies the minimum information that must be included in the report.

HOW THE SECTIONS WILL FUNCTION.

Section 3.9701 specifies the purpose of the subchapter. Section 3.9702 specifies the applicability and scope of the subchapter. It also specifies the types of annuity contracts to which the new rules apply and do not apply.

Under §3.9703, the rules apply only to annuity transactions subject to regulation under the subchapter that occur on or after six months after the effective date of the rule as adopted.

Section 3.9704 specifies that the words and terms defined in the Insurance Code Chapter 102 have the same meaning when used in the subchapter. The section defines the terms *agent, buyer's guide, contract owner, disclosure document, funding agreement, generic name, and structured settlement annuity.* Section 3.9705 defines and provides examples of the term *determinable elements.*

Section 3.9706 defines the terms *guaranteed element and non-guaranteed element.*

Section 3.9707 specifies that compliance with the subchapter is not a defense in any action brought by or for the Department alleging a violation of the Insurance Code, or, except for this subchapter regulating annuity disclosures, any rule adopted pursuant to the Insurance Code.

Section 3.9708 specifies certain consumer notices required under the subchapter. Section 3.9708(a) specifies that if an application for an annuity contract or certificate is taken in a face-to-face meeting, the applicant must be given at or before the time of application both a disclosure document and the appropriate buyer's guide specified in §3.9710 of the subchapter. Section 3.9708(b) specifies that if the application is taken by means other than in a face-to-face meeting the applicant must be sent not later than the fifth business day after the date on which the completed application is received by the insurer both a disclosure document and the appropriate buyer's guide specified in §3.9710 of the subchapter. Section 3.9708(c) specifies that if the insurer receives the application as a result of a direct solicitation through the mail, the insurer providing the appropriate buyer's guide and a disclosure document in a mailing inviting prospective applicants to apply for an annuity contract or certificate is considered to satisfy the requirement in §3.9708(b) that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application. Section 3.9708(d) specifies that if the application is received through the Internet, and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website which are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document are deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application.

Section 3.9708(e) specifies that a solicitation for an annuity contract that is provided in a manner other than a face-to-face meeting must include a statement that the proposed applicant may contact the insurer for a free annuity buyer's guide. Section 3.9708(f) specifies that applications for private placement contracts do not require a buyer's guide as described in §3.9710. Section 3.9708(g) specifies that §3.9708 applies regardless of whether an insurer is providing a 15-day free look period like that required in §3.9711(a) prior to the adoption of these rules or whether the insurer begins providing the 15-day free look period in accordance with §3.9711(a).

Section 3.9709 specifies the minimum requirements for the disclosure document required under the subchapter. Section 3.9709(a) specifies the minimum information that must be included in the required disclosure document, if applicable. Under §3.9709(b), an insurer is required to define terms used in the disclosure document in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure document is directed. Section 3.9709(c) further specifies that the subsection does not limit the commissioner's ability to enforce the other provisions of the section or require the use of a FINRA-approved disclosure document. Additionally, a safe harbor is provided from the provisions of the rules for an annuity contract that is regulated by, and complies with, the FINRA Conduct Rules and the SEC prospectus requirements pertaining to disclosure.

Section 3.9710 specifies that for the purposes of the subchapter, an appropriate buyer's guide is the latest version of the buyer's guide adopted by the NAIC that applies to the particular type of annuity (such as fixed deferred annuity, equity-indexed annuity, or variable annuity) that is the subject of the transaction. If the NAIC has not adopted a buyer's guide for equity-indexed annuities, then the appropriate buyer's guide is the Buyer's Guide to Fixed Deferred Annuities that has been most recently adopted by the NAIC. The section specifies that if the NAIC has not adopted a buyer's guide for variable annuities, then no buyer's guide is required until one year after the date on which the subchapter becomes effective. If the NAIC has not adopted a buyer's guide for variable annuities within one year after the date on which the subchapter becomes effective, then for purposes of the subchapter the appropriate buyer's guide is the latest version of the SEC's Office of Investor Education and Advocacy "Variable Annuities: What You Should Know," SEC Pub. 011.

Section 3.9711 specifies the provisions relating to the free look period required in certain circumstances. Under §3.9711(a), if the required buyer's guide and the disclosure document are not provided at or before the time of application, then a free look period of at least 15 calendar days must be provided during which the applicant may return the contract without penalty. Under §3.9711(b), insurers are required to provide the notice of the free look period to consumers in a notice that is included on or attached to the cover page of the delivered annuity contract and are required to prominently disclose information concerning the 15-day free look period in the notice.

Section 3.9711(c) specifies that the free look period begins the date the consumer receives the contract and runs concurrently with any other free look period required under the Texas Administrative Code, the Texas Insurance Code, or another law of this state. Section 3.9711(d) specifies that an unconditional refund without penalty for purposes of the section for variable or modified guaranteed annuity contracts means a refund equal to the cash surrender value provided in the annuity contract, plus any fees or charges deducted from the premiums or imposed under the contract. Section 3.9711(e) specifies that the refund and free look period requirements in the section do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the United States Securities and Exchange Commission.

Under §3.9712, for annuities in the payout period with changes in non-guaranteed elements and for the accumulation period of a deferred annuity, the insurer is required to provide each contract owner with a report on the status of the contract. The report, which must be provided at least annually, must include certain specified information, including (i) the beginning and ending dates of the current reporting period; (ii) the accumulation and cash surrender value, if any, at the end of the previous reporting period; and the current reporting period; (iii) the total amounts, if any, that have been credited, charged to the contract or certificate value, or paid during the current reporting period; and (iv) the amount of any outstanding loans as of the end of the current reporting period.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

§3.9702. Applicability and Scope.

Comment: Commenters requested that §3.9702(b)(1) be revised to read "immediate and deferred annuities that contain *no non-guaranteed elements."* A commenter noted that the proposed language of "immediate and deferred annuities that contain *only guaranteed elements"* could include annuities that have no non-guaranteed elements but do contain determinable elements.

Agency Response: The Department agrees with the commenters and has revised proposed §3.9702 as the commenters suggested. Excluding from applicability annuities that contain determinable elements was not the intent of the proposed rules. Therefore, the Department has §3.9702(b)(1) as adopted to read "immediate and deferred annuities that contain no non-guaranteed elements."

Comment: A commenter suggests a new provision be added to proposed §3.9702 to provide that private placement contracts to accredited investors be excluded from the rule's applicability. The commenter's reasons are: (i) private placement contracts involving accredited investors are exempt from Securities Exchange Commission (SEC) registration; and (ii) the use of a prospectus is not required under securities rules. According to the commenter, the Department should exclude exempt insurers from providing a disclosure notice and a buyer's guide to accredited investors who are presumed to be financially sophisticated as recognized by the SEC. The term "accredited investor" is defined by federal securities law, and for a natural person requires exceeding either a net worth or income requirement.

Agency Response: The Department understands that investors in private placement contracts may not require the same degree of consumer protection as other annuity buyers For example, the rules in §3.9711 requiring the free look period create an exception for accredited investors. However, the Department declines to exclude private placement contracts from the applicability of the entire rule for the following reasons: (i) accredited investors are presumed to have a higher degree of investor sophistication, and do not need the buyers guide; (ii) even accredited investors considering the purchase of a private placement annuity contract can benefit from the additional information required in §3.3709 which requires certain disclosures related to the annuity product being considered for purchase; (iii) the extra costs in distributing a disclosure does not outweigh the potential benefits of the disclosures; and these disclosure requirements can be satisfied by the usual prospectus and disclosures that prospective private placement annuity buyers are already given. Therefore, insurers offering private market annuity products can provide the required disclosures without undue hardship. However, in response to the comment and in lieu of revising proposed §3.9702 as requested by the commenter, the Department is revising proposed §3.9708 and §3.9709. Section 3.9708 is revised in this adoption to add new subsection (f), which amends the buyer's guide requirement to create an exception for private placement contracts. Addition-

ally, §3.9709(a) is revised to clarify that elements in paragraphs (1) - (13) are only necessary "if applicable." These two revisions respond in part to the commenter's concerns but also balance the consumer protection interests of accredited investors while still ensuring that those investors are provided sufficient information to make a fully informed investment decision.

§3.9703. Effective Date.

Comment: One commenter requests that the Department consider a later effective date of six months from the date the rules are adopted. The commenter's reasons are: (i) other states currently exclude variable annuities from their annuity disclosure rules; (ii) insurers will need time to comply with the new regulations; and (iii) insurers need the time to update computer systems and training manuals, develop and/or update application forms and disclosure documents, as well as conduct agent training to ensure compliance with the new rules.

Agency Response: The Department appreciates the cost and compliance concerns of insurers and has made the requested change in §3.9703 as adopted: "This subchapter shall apply only to annuity transactions subject to regulation under this subchapter that occur on or after *the date that is six months after the effective* date of this subchapter."

§3.9708. Required Consumer Notice.

Comment: Two commenters state that the language "in order to satisfy" in §3.9708(d) implies that the delivery of consumer notices via the Internet would be a mandatory requirement if an application is received online. According to one commenter, requiring insurers to provide these disclosure agreements and acknowledgement through the Internet would require program changes. The commenters suggest that the language allow for the delivery of the consumer notice via the Internet as an option that replaces a hard copy mail delivered notice rather than a mandatory requirement.

Agency Response: The Department agrees with the commenters and has revised §3.9708(d) to incorporate the commenters' suggested change. Section 3.9708(d) as adopted is revised to read: "If the application is received through the Internet, and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website which are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document shall be deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application."

§3.9709. Disclosure Document.

Comment: Two commenters suggest that the language "that is reasonably intelligible to the average consumer" in §3.9709(a)(13) be deleted. The commenters assert the following reasons for the requested change: (i) the language is not in the NAIC model act; (ii) the language was not in House Bill (HB) 1293, as enacted by the 81st Legislature, Regular Session, which was vetoed; (iii) the language is a subjective standard that is not clearly defined; and (iv) §3.9709(b) provides a clear standard without that language that is applicable to the entire disclosure document. Additionally, one commenter asked that if this language is not deleted, that the Department clarify the language for compliance purposes.

Agency Response: The Department agrees with the commenters and has revised proposed §3.9709(a)(13) to delete the language as the commenters suggested.

Comment: One commenter suggests a new §3.9709(b) to require that the disclosure document in proposed §3.9709 be required to score no less readable than an eighth grade score on the Flesch-Kincaid readability test. According to the commenter, adopting readability standards for disclosure documents would strengthen the rules. The commenter expresses concern that not having readable buying guides and disclosure notices would diminish important consumer protections for complex insurance products.

Agency Response: The Department understands the expressed concern but declines to make the requested change. The Department's reasons are the following. First, the rule already includes a requirement in §3.9709(b) that an insurer must define terms used in the disclosure document in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure document is directed. The Department acknowledges that some annuity products on the market may be intended to be sold only to sophisticated investors who may benefit from a notice appropriate to their level of financial expertise. Second, it is the Department's position that the readability language requirements in the rule are sufficient to ensure that the disclosure documents will be readable by intended consumers. Third, the Department's position is that uniformity of disclosure documents across states is an important objective. A Flesch-Kincaid readability test requirement is not consistent with that objective because it could necessitate the revision of already established out-of-state disclosure notices for products sold in Texas, thereby increasing the costs to insurers that would likely be passed on to consumers.

§3.9710. Buyers Guide.

Comment: Two commenters recommend that until the National Association of Insurance Commissioners (NAIC) produces a buyer's guide specific to variable annuities, no buyer's guide should be distributed. A commenter asserts that providing the fixed deferred annuity buyer's guide as required in §3.9710 could be confusing to prospective buyers of variable annuities. Further, one commenter states that the prospectus that the SEC already requires for most variable annuities contains pertinent information about that type of annuity. Another commenter suggests that during the interim period in which no NAIC Buyer's Guide for Variable Annuities has been published, that the Department require the SEC's document titled "Variable Annuities: What You Should Know" as an appropriate buyer's guide for the purposes of §3.9708.

Agency Response: The Department agrees that a specific NAIC buyer's guide to variable annuities would be the preferred mandatory buyer's guide. Though the Department prefers that insurers provide the NAIC's annuity buyer's guides, the specific buyer's guide for both equity-indexed and variable annuities have not yet been adopted by the NAIC. The proposed §3.9710 requirement that the NAIC's Buyer's Guide to Fixed Deferred Annuities be provided for equity-indexed and variable annuities represents the purposeful intent of the Department to ensure that alternative information be provided for the benefit of prospective consumers if NAIC buyer's guides that apply to the particular type of annuity that is the subject of the transaction are not available. Therefore, in response to the comments, the Department has revised §3.9710 in this adoption to require no

buyer's guide for variable annuity sales for the first year after these rules become effective.

Under the rules as adopted, thereafter, if the NAIC has not yet adopted a buyer's guide specific to variable annuities, then the appropriate buyer's guide will be the most recently published SEC "Variable Annuities: What You Should Know", SEC Pub. 011. This revision is made because the Department has determined that this pamphlet provides useful information to prospective variable annuity customers. The one-year delay is necessary to provide the NAIC Working Group additional time to adopt a buyer's guide for variable annuities. However, the Department does not control the NAIC's development or adoption of the buyer's guides, and therefore the Department cannot guarantee that a specific buyer's guide for variable annuities will be adopted during the next year. Therefore, §3.9710 as adopted specifies that the appropriate buyer's guide for variable annuities is the SEC's pamphlet, in the event that a variable annuity specific guide is not adopted by the NAIC within one year after the date that the rules become effective. Additionally, proposed §3.9710 is revised as adopted to clarify that if the NAIC has not adopted a buyer's guide for equity-indexed annuities, the appropriate buyer's guide is the Buyer's Guide to Fixed Deferred Annuities that has been most recently adopted by the NAIC.

§3.9711. Free Look.

Comment: One commenter expresses concern that proposed §3.9711(a) may harm consumers by providing a safe harbor for insurers to effectively ignore the proposed consumer notice and buyer's guide rule provisions in those instances in which a company currently provides a 15-day free look period, i.e., before these rule requirements are adopted. The commenter recommends deleting "If the buyer's guide and disclosure document required by this subchapter are not provided at or before the time of application."

Agency Response: The Department understands the concern of the commenter and has made a clarifying change in the proposal. The Department, however, does not agree with deleting the language suggested by the commenter because such a change would result in these rules providing a blanket free look period for applicable annuities, regardless of whether the required consumer notices are provided. This deletion is not consistent with the intent of the rule to create a self-help consumer remedy when the required consumer notices are not timely provided. It is the Department's opinion that regardless of whether this recommended deletion is made, the Department would have the regulatory authority to enforce all of the requirements in these rules, including §3.9708 relating to required consumer notices. However, in lieu of revising proposed §3.9711(a), as requested by the commenter, the Department has revised proposed §3.9708, relating to required consumer notices, to add a new subsection (g) to clarify that insurers have a duty to provide consumer notices, and that a 15-day free look is an additional remedy for annuity buyers but not a safe harbor creating immunity from Department regulatory action. Section 3.9708(g) as adopted reads: "(g) This section applies regardless of whether an insurer is providing a 15-day free look period like that required in §3.9711(a) of this subchapter (relating to Free Look Period) prior to the adoption of this subchapter or whether the insurer begins providing the 15-day free look period in accordance with §3.9711(a) of this subchapter.

Comment: A commenter urges that the Department remove proposed §3.9711(e), which provides that the refund and free look period requirements of the subsection do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the SEC. The commenter states that accredited investors should also be given the opportunity of a free look period.

Agency Response: The Department declines to make the requested change for the following reasons. The Department is of the opinion that accredited investors are more sophisticated purchasers and therefore do not need every protection designed for more unsophisticated consumers. The Department's understanding is that a natural person who may qualify as an accredited investor under federal securities regulations must affirmatively represent to an insurer that they meet the definition in the SEC's Regulation D if they wish to be treated as an accredited investor. A natural person that potentially meets the federal regulatory definition of an accredited investor can choose between being treated as a non-accredited investor natural person for purposes of the rule, or can voluntarily opt into the market available to accredited investors under the SEC's Regulation D. Therefore, an individual who is a potential accredited investor may benefit from the free look option provided by §3.9711 at their own initiative by declining to self-identify as an accredited investor.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For, with changes: American Association of Retired Persons (AARP), American Council of Life Insurers (ACLI), Office of Public Insurance Counsel (OPIC), and Texas Association of Life and Health Insurers (TALHI).

Against: None.

STATUTORY AUTHORITY. The new subchapter is adopted under the Insurance Code §§1108.002, 31.002, 101.051(b)(1), (b)(3), and (b)(5)(A), 1152.002, 1114.007, 1114.001, and 36.001. Section 1108.002 specifies that for the purpose of regulation under the Insurance Code, an annuity contract is considered an insurance policy or contract if the annuity contract is issued by a life, health, or accident insurance company, including a mutual company or fraternal benefit society or issued under an annuity or benefit plan used by an employer or individual. Section 31.002 specifies that in addition to other required duties, the Department shall regulate the business of insurance in this state; administer the workers' compensation system of this state as provided by the Labor Code Title 5; and ensure that the Insurance Code and other laws regarding insurance and insurance companies are executed. Section 101.051(b)(1) specifies that the making or proposing to make, as an insurer, an insurance contract constitutes the business of insurance in this state. Section 101.051(b)(3) specifies that taking or receiving an insurance application constitutes the business of insurance in this state. Section 101.051(b)(5)(A) specifies that issuing or delivering a contract to a resident of this state constitutes the business of insurance. Section 1152.005 specifies that the Commissioner may adopt rules that are fair, reasonable, and appropriate to augment and implement the Insurance Code Chapter 1152, relating to separate accounts and variable annuity contracts, including rules establishing agent licensing, standard policy provisions, and disclosure.

Section 1114.007 specifies that the Commissioner may adopt reasonable rules in the manner prescribed by Subchapter A, Chapter 36, to accomplish and enforce the purpose of Chapter 1114. Section 1114.001 states that the purpose of Chapter 1114 is to regulate the activities of insurers and agents with respect to the replacement of existing life insurance and annuities;

protect the interests of purchasers of life insurance or annuities by establishing minimum standards of conduct to be observed in certain transactions; ensure that purchasers receive information with which a decision in the purchaser's best interest may be made; reduce the opportunity for misrepresentation and incomplete disclosure; and establish penalties for failure to comply with the requirements adopted under Chapter 1114. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§3.9702. Applicability and Scope.

(a) This subchapter applies to all group and individual annuity contracts and certificates except as provided by subsection (b) of this section.

(b) This subchapter does not apply to the following annuity products except as provided in subsection (c) of this section:

(1) immediate and deferred annuities that contain no non-guaranteed elements;

(2) annuities used to fund:

(A) an employee pension plan subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.);

(B) a plan described by the Internal Revenue Code of 1986 §§401(a), 401(k), or 403(b), in which the plan, for purposes of the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.), is established or maintained by an employer;

(C) a governmental or church plan as defined by the Internal Revenue Code of 1986 §414, or a deferred compensation plan of a state or local government or a tax-exempt organization under the Internal Revenue Code of 1986 §457;

(D) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor; or

(E) prepaid funeral benefits, as defined by the Finance Code Chapter 154;

(3) a structured settlement annuity;

(4) a charitable gift annuity qualified under the Insurance Code Chapter 102; or

(5) a funding agreement.

(c) Notwithstanding the exemptions specified in subsection (b) of this section, this subchapter applies to an annuity used to fund a plan or arrangement that is funded solely by contributions an employee elects to make, whether on a pre-tax or after-tax basis, if the insurer has been notified that plan participants may choose from among two or more fixed annuity providers and there is a direct solicitation of an individual employee by an agent for the purchase of an annuity contract. As used in this subsection, "direct solicitation" does not include a meeting held by an agent solely for the purpose of educating or enrolling employees in the plan or arrangement.

§3.9703. Effective Date.

This subchapter shall apply only to annuity transactions subject to regulation under this subchapter that occur on or after the date that is six months after the effective date of this subchapter.

§3.9706. Guaranteed and Non-guaranteed Elements.

(a) For the purposes of this subchapter, "guaranteed element" means an element listed in §3.9705(a)(1) - (7) of this subchapter (relating to Determinable Elements) that is guaranteed and determined at issue. An element is considered guaranteed if all of the underlying elements used in its computation are guaranteed.

(b) For the purposes of this subchapter, "non-guaranteed element" means an element listed in §3.9705(a)(1) - (7) of this subchapter that is subject to the insurer's discretion and is not guaranteed at issue. An element is considered non-guaranteed if any underlying element used in its computation is non-guaranteed.

§3.9708. Required Consumer Notices.

(a) If an application for an annuity contract or certificate is taken in a face-to-face meeting, the applicant shall be given at or before the time of application both a disclosure document and the appropriate buyer's guide specified in §3.9710 of this subchapter (relating to Buyer's Guide).

(b) If the application is taken by means other than in a face-to-face meeting the applicant shall be sent not later than the fifth business day after the date on which the completed application is received by the insurer both a disclosure document and the appropriate buyer's guide specified in §3.9710 of this subchapter.

(c) If the insurer receives the application as a result of a direct solicitation through the mail, the insurer's providing the appropriate buyer's guide and a disclosure document in a mailing inviting prospective applicants to apply for an annuity contract or certificate satisfies the requirement in subsection (b) of this section that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application.

(d) If the application is received through the Internet, and if the insurer takes reasonable steps to ensure that the appropriate buyer's guide and a disclosure document are available for viewing and printing on the insurer's website which are opened or acknowledged by the prospective applicant, the provided buyer's guide and disclosure document shall be deemed to satisfy the requirement that the appropriate buyer's guide and the disclosure document be provided not later than the fifth business day after the date of receipt of the application.

(e) A solicitation for an annuity contract that is provided in a manner other than a face-to-face meeting must include a statement that the proposed applicant may contact the insurer for a free annuity buyer's guide.

(f) Insurers receiving an application for private placement contracts as defined by the Insurance Code §1152.110(a) are not required to provide the buyer's guide specified in §3.9710 of this subchapter.

(g) This section applies regardless of whether an insurer is providing a 15-day free look period like that required in §3.9711(a) of this subchapter (relating to Free Look Period) prior to the adoption of this subchapter or whether the insurer begins providing the 15-day free look period in accordance with §3.9711(a) of this subchapter.

§3.9709. Disclosure Document.

(a) At a minimum, the following information, if applicable, must be included in the disclosure document required to be provided under this subchapter:

(1) the generic name of the contract; the insurer product name, if different from the generic name; the product's form number; and a statement of the fact that the contract is an annuity;

(2) the insurer's name and address;

(3) a description of the contract and the benefits provided under the contract; the description must emphasize the long-term nature of the contract and include examples of the long-term nature as appropriate;

(4) the guaranteed, non-guaranteed, and determinable elements of the contract, any limitations of those elements, and an explanation of how those elements operate;

(5) an explanation of the initial crediting rate, specifying any bonus or introductory portion, the duration of the initial crediting rate, and the fact that rates may change from time to time and are not guaranteed;

(6) periodic income options, both on a guaranteed and non-guaranteed basis;

(7) any value reductions caused by withdrawals from or surrender of the contract;

(8) how values in the contract can be accessed;

(9) the death benefit, if available, and how the death benefit is computed;

(10) a summary of:

(A) the federal tax status of the contract; and

(B) any penalties applicable on withdrawal of values from the contract;

(11) the impact of any rider, such as a long-term care rider;

(12) a list of the specific dollar amount or percentage charges and fees, with an explanation of how those charges and fees apply; and

(13) information about the current guaranteed rate for new contracts that contains a clear notice that the rate is subject to change.

(b) An insurer shall define terms used in the disclosure document in language that facilitates the understanding by a typical person within the segment of the public to which the disclosure document is directed.

(c) A disclosure document that complies with the Financial Industry Regulatory Authority (FINRA) Conduct Rules and the United States Securities and Exchange Commission (SEC) prospectus requirements satisfies the requirements of this section for disclosure documents. This subsection does not limit the commissioner's ability to enforce the other provisions of this section or require the use of a FINRA-approved disclosure document. This subsection provides a safe harbor under this subchapter for an annuity contract that is regulated by, and complies with, the FINRA Conduct Rules and the SEC prospectus requirements pertaining to disclosure.

§3.9710. Buyer's Guide.

For the purposes of this subchapter, an appropriate buyer's guide is the latest version of the buyer's guide adopted by the NAIC that applies to the particular type of annuity (such as fixed deferred annuity, equity-indexed annuity, or variable annuity) that is the subject of the transaction. If the NAIC has not adopted a buyer's guide for equity-indexed annuities, then the appropriate buyer's guide is the Buyer's Guide to Fixed Deferred Annuities that has been most recently adopted by the NAIC. If the NAIC has not adopted a buyer's guide for variable annuities, then no buyer's guide is required until one year after the date on which this subchapter becomes effective. If the NAIC has not adopted a buyer's guide for variable annuities within one year after the date on which this subchapter becomes effective, then for purposes of this subchapter the appropriate buyer's guide is the latest version of the SEC's Office of Investor Education and Advocacy "Variable Annuities: What You Should Know", SEC Pub. 011.

§3.9711. Free Look Period.

(a) If the buyer's guide and the disclosure document required by this subchapter are not provided at or before the time of application, a free look period of at least 15 calendar days must be provided during which the applicant may return the contract without penalty.

(b) Notice of the free look period required under this section must be provided to consumers in a notice that is included on or attached to the cover page of the delivered annuity contract. The notice must prominently disclose information concerning the 15-day free look period.

(c) The free look period shall begin on the date the consumer receives the annuity contract and shall run concurrently with any other free look period required under the Texas Administrative Code, the Texas Insurance Code, or another law of this state.

(d) An unconditional refund without penalty for purposes of this section for variable or modified guaranteed annuity contracts shall mean a refund equal to the cash surrender value provided in the annuity contract, plus any fees or charges deducted from the premiums or imposed under the contract.

(e) The refund and free look period requirements in this section do not apply if the prospective owner is an accredited investor, as defined in Regulation D as adopted by the United States Securities and Exchange Commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 9, 2011.

TRD-201100531
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General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: March 1, 2011
Proposal publication date: August 13, 2010
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CHAPTER 21. TRADE PRACTICES

SUBCHAPTER P. MENTAL HEALTH PARITY

28 TAC §§21.2401 - 21.2407

The Commissioner of Insurance (Commissioner) adopts amendments to Subchapter P, §§21.2401 - 21.2407, concerning requirements for parity between mental health or substance use disorder benefits and medical/surgical benefits. Section 21.2401 is adopted with changes to the proposed text published in the December 3, 2010, issue of the *Texas Register* (35 TexReg 10588). Sections 21.2402 - 21.2407 are adopted without changes.

REASONED JUSTIFICATION. The amendments are necessary to implement the federal Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), which was enacted October 3, 2008, as sections 511 and 512 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 (Publ. L. 110-343, Division C) (122 Stat. 3881). The MHPAEA amends the Employee Retirement Income Security Act of 1974 (ERISA), at 29 USCA §1185a; the Public Health Service Act (PHS Act), at 42 USCA §300gg-26; and the Internal Revenue Code of 1986 (Code), at 26 USCA §9812.

The amendments also are necessary to allow the Department to maintain state regulatory authority over health plan issuers that

issue coverage to group health plans in Texas, as required by §1501.010 of the Insurance Code.

The MHPAEA became effective in terms of application to group health plans for plan years beginning after October 3, 2009. The Act preempts state law regarding mental health and substance use disorder coverage to the extent that such state law prevents the application of a requirement of the MHPAEA. Moreover, the Act requires full parity if coverage is included in a health benefit plan. The Act does not, however, require that such coverage be included in a health benefit plan.

For plans that offer mental health or substance use disorder benefits, MHPAEA requires group health plans and group health plan issuers to ensure that financial requirements such as copayments or deductibles and treatment limitations such as visit limits applicable to mental health or substance use disorder benefits are no more restrictive than the predominant financial requirements or treatment limitations applied to substantially all medical/surgical benefits. The term *predominant* is defined as the most common or frequent of such type of limitation or requirement.

On April 15, 2010, the Department posted on its website, for informal comment, the draft rule text and cost note estimates. On April 29, 2010, the Department held a public meeting to receive oral informal comments on the draft rule text and the note of estimated costs.

The statement of estimated costs was considered further as a result of comments received during the informal posting. As indicated in the Public Benefit/Cost Note portion of the published proposal, however, the Department did not receive information adding to or conflicting with its cost estimates.

The proposed amendments were formally published in the December 3, 2010, issue of the *Texas Register* (35 TexReg 10588). The Department received comments on the proposed amendments. No request for public hearing on the published proposal was received.

The following changes are made to the proposed text.

Section 21.2401(1) is changed in response to a request to clarify the date of application of the amendments. The change provides that the subchapter applies to health plan issuers providing coverage to group health plans for both medical/surgical benefits and mental health or substance use disorder benefits which are delivered, issued for delivery, or renewed on or after March 1, 2011.

Section 21.2401(2) is changed in connection with the request to clarify the date of application of the amendments. The change provides that coverage to group health plans delivered, issued for delivery, or renewed prior to March 1, 2011 is subject to the provisions of the subchapter in effect at the time such plans were delivered, issued for delivery, or renewed.

Section 21.2401(3) is removed in connection with a request to modify the text to clarify the application date of provisions with which it is associated. The changes to paragraphs (1) and (2) in response to and connection with comment and request for clarification of application date of the amended sections makes it unnecessary to retain paragraph (3) as a further amendment to the section.

HOW THE SECTIONS WILL FUNCTION. The amendments to the subchapter set forth rules for health plan issuers that provide coverage to group health plans affected by the MHPAEA, to assure that the coverage offered by those group health plans will be in compliance with the federal statute.

Section 21.2401 states the purpose and scope of the subchapter. Amendments identify, with reference to issuance or renewal of the health plan issuers' coverage, the date on and after which the sections apply.

Section 21.2402 defines the terms used in the subchapter. Definitions of the terms *aggregate lifetime limit, annual limit, base period, coverage, group health plan,* and *mental health benefits* include conforming amendments. The definitions of *incurred expenditures* and *medical/surgical benefits* are amended to include reference to substance use disorder benefits. The term *mental health benefits* contains conforming amendments and further is amended to remove exclusion of benefits for treatment of substance abuse or chemical dependency. New definitions for the terms *financial requirement, health plan issuer, large employer, predominant, small employer, substance use disorder benefits,* and *treatment limitation* are included in the amendments to the section. The term *health plan issuer* is defined to include all providers of group health insurance coverage, group health care coverage or group health benefit coverage that are regulated under the Insurance Code.

Amendments to §21.2403 change the section heading to indicate that it addresses large employer health plan parity requirements. Amendments to §21.2403 provide a working, applicable definition of the term "substantially all" in relation to the medical benefits covered by a group health plan, or within a classification of benefits in a group health plan, as applicable.

For purposes of the section, "substantially all" means at least two-thirds of all medical benefits covered by the group health plan, or within such classification of benefits, as applicable.

Amendments to the section make conforming references to *health plan issuer* to describe an entity issuing a group health plan, as well as conforming additional references to substance use disorder benefits at each reference location of the term *mental health benefits.* Amendments to §21.2403(a) add a new paragraph (5) to provide that financial requirements must be no more restrictive for mental health or substance use disorder benefits than the predominant financial requirements applied to substantially all medical and surgical benefits covered by the group health plan. The amendments to the subsection add a new paragraph (6) to provide that treatment limitations must be no more restrictive for mental health or substance use disorder benefits than the predominant treatment limitations applied to substantially all medical and surgical benefits covered by the group health plan.

Amendments to §21.2403(a) add a new paragraph (7) to prohibit separate cost-sharing requirements or separate treatment limitations that are applicable only with respect to mental health or substance use disorder benefits. The amendments to the subsection add a new paragraph (8) to provide that for purposes of the section, whether a financial requirement or treatment limitation is a predominant financial requirement or treatment limitation that applies to substantially all medical/surgical benefits in a classification is determined separately for each type of financial requirement or treatment limitation. The amendments set forth the classifications to be utilized in applying the provisions of this subsection.

Amendments to §21.2403 add a new subsection (c) to provide that if a large employer group health plan provides both medical and surgical benefits and mental health or substance use dis-

order benefits, utilization review for mental health or substance use disorder benefits shall be conducted in accordance with provisions of the Insurance Code Chapter 4201.

The amendments to the section also add a new subsection (d) to provide that if a large employer group health plan provides both medical and surgical benefits and mental health or substance use disorder benefits and the plan provides coverage for medical and surgical benefits provided by out-of-network providers, the plan also must provide coverage for mental health or substance use disorder benefits provided by and services performed by out-of-network providers.

Amendments to §21.2403 add a new subsection (e) to require that regardless of whether a large employer group health plan provides both medical and surgical benefits and mental health or substance use disorder benefits, it must nonetheless provide coverage for treatment of serious mental illness, based on medical necessity, for no fewer than 45 days of inpatient treatment and no fewer than 60 visits for outpatient treatment in accordance with the Insurance Code Chapter 1355 and subsection (b)(1) of the amended section.

The amendments to the section also add a new subsection (f) to require that pursuant to the Insurance Code Chapter 1368 and in accordance with subsection (b)(1) of the section, a large employer group health plan must provide coverage for the necessary care and treatment of chemical dependency in accordance with minimum standard requirements set forth in §§1368.004 - 1368.006(a) and §1368.007, and Chapter 3, Subchapter HH of this title (relating to Standards for Reasonable Cost Control and Utilization Review for Chemical Dependency Treatment Centers).

Amendments to §21.2404 change the section heading to indicate that it addresses small employer health plan parity requirements. Amendments to the section also make conforming references to *health plan issuer* to describe an entity issuing a group health plan.

Amendments to §21.2404(b) replace existing text with new text to require that, notwithstanding provisions in subsection (a) stating that the subchapter does not apply to a health plan issuer with respect to a plan year of a small employer, a health plan issuer must offer coverage for serious mental illness as described in the Insurance Code §1355.004, and that if the employer accepts the coverage, such coverage must meet the requirements of §1355.004.

The amendments to the section also add a new subsection (c) to require that, notwithstanding provisions in subsection (a) stating that the subchapter does not apply to a health plan issuer with respect to a plan year of a small employer, a health plan issuer must nonetheless provide coverage for substance use disorder that meets the minimum coverage requirements of the Insurance Code Chapter 1368.

Amendments to §21.2405 add a new subsection (a) to provide that a health plan issuer's coverage is not subject to the large-employer parity requirements described in §21.2403 if such issuer demonstrates an increase in the cost for such coverage in accordance with the section. The amendments to the section redesignate existing subsection (a) as subsections (b) and (c).

The amendments add new paragraphs (1) and (2) to subsection (b) as redesignated to provide that the issuer must demonstrate with actual data that application of the subchapter results in an increased cost of coverage of at least two percent in the first plan year in which it was applied and at least one percent in subsequent years.

The amendments add new paragraphs (1) and (2) to subsection (c) as redesignated to provide that the base period for increased cost measure is six months, within which period the coverage must comply with the provisions of the subchapter. The amendments redesignate existing subsection (b) as subsection (d) and add text to that subsection as redesignated to provide that the determination of increases to actual costs must be made and certified by a qualified, licensed actuary who is a member in good standing of the American Academy of Actuaries. The amendments delete Figure: 28 TAC §21.2405(b) from existing subsection (b). The amendments delete text to existing subsection (c).

In addition, the amendments to §21.2405 add a new subsection (e) to require that a health plan issuer that qualifies for and elects to implement the exemption must promptly notify the Department, as well as the federal Secretary of Health and Human Services, and the beneficiaries in the plan of such election. The amendments to the section redesignate existing subsection (d) as subsection (f), redesignate existing subsection (e) as subsection (g) and delete text to existing subsection (f).

Finally, the amendments to the section add a new subsection (h) to provide that an employer may elect to continue to apply mental health and substance use disorder parity with respect to the health plan for which the determination is made regardless of any increase in total costs.

The amendment to §21.2406 conforms the reference to a health plan issuer.

Amendments to §21.2407 provide that a health plan issuer may not sell coverage that does not meet the large-employer parity requirements described in §21.2403 unless such coverage meets the small employer parity requirements addressed in §21.2404, or the criteria relating to the cost-of-coverage exemption set forth in §21.2405.

The amendments apply to health plan issuers providing coverage to group health plans for both medical/surgical benefits and mental health or substance use disorder benefits which are delivered, issued for delivery, or renewed on or after March 1, 2011, the effective date of the amendments as adopted.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: One commenter requested that clarifying language be added to §21.2401(1) to assure that provisions in the subchapter as amended which directly correspond to federal regulatory provisions relating to mental health or substance use disorder benefits are effective and applicable on or after July 1, 2010, the applicability date of the federal regulation to health plan issuers of such coverage benefits.

Agency Response: The Department agrees that clarification to §21.2401(1) regarding applicability of the subchapter to coverage for benefits to which the subchapter applies is helpful. It makes a clarifying change to §21.2401(1) and (2) to provide for a March 1, 2011 application date for the amendments, so that provisions of the amended subchapter apply to health plan issuers providing coverage to group health plans for both medical/surgical benefits and mental health or substance use disorder benefits which is delivered, issued for delivery, or renewed on or after March 1, 2011, the effective date of the amendments. The clarifying change in paragraph (2) provides that coverage to group health plans delivered, issued for delivery, or renewed prior to March 1, 2011 is subject to the provisions of the subchapter in

effect at the time such plans were delivered, issued for delivery, or renewed.

Comment: One commenter requested that §21.2401(3) be revised to more clearly indicate effectiveness and applicability dates of any provisions of Public Law 111-148, the Patient Protection and Affordable Care Act of 2010 applicable to coverage for mental health and substance use disorder benefits, as well as any such federal regulations promulgated pursuant to the provisions of the Act, by stating that such provisions are applicable to and effective for coverage to group health plans delivered, issued for delivery, or renewed for a plan year beginning on or after the effective date provided in the Act or in such federal regulations.

Agency Response: The Department agrees that clarification of the applicability date of the amended sections to coverage issued or renewed on or after such date is helpful. Because the Department has changed paragraphs (1) and (2) to indicate a date certain for applicability of the amended sections in response to and connection with other comments on §21.2401 relating to clear statement of applicability date, paragraph (3) has been removed.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For: None.

Against: None.

Neither for nor against, with changes: Texas Association of Health Plans.

STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code Chapters 843, 846, 1251 and 1501, and §36.001. Chapter 843 addresses health maintenance organizations. Section 843.151 provides that the Commissioner may adopt reasonable rules as necessary and proper to meet the requirements of federal law and regulations. Chapter 846 relates to certain multiple employer welfare arrangements. Section 846.005 requires the Commissioner to adopt rules necessary to meet the minimum requirements of federal law and regulations. Chapter 1251 addresses group and blanket health insurance. Section 1251.008 provides that the Commissioner may adopt rules necessary to administer the chapter. Chapter 1501 implements provisions regarding small and large employers which were necessary to comply with the federal requirements contained in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). Section 1501.010 requires the Commissioner to adopt rules necessary to implement Chapter 1501, and to meet the minimum requirements of federal law, including regulations, which for small and large employer health plan issuers are contained in HIPAA and in regulations adopted by federal agencies to implement HIPAA. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§21.2401. Purpose and Scope.

The purpose of this subchapter is to coordinate the requirements of Texas law with federal law requiring parity between certain mental health or substance use disorder benefits and medical/surgical benefits.

(1) This subchapter applies to health plan issuers providing, as allowed by law, coverage to group health plans for both medical/surgical benefits and mental health or substance use disorder benefits, which is delivered, issued for delivery, or renewed on or after March 1, 2011.

(2) Coverage to group health plans delivered, issued for delivery, or renewed prior to March 1, 2011 is subject to the provisions of this subchapter in effect at the time such plans were delivered, issued for delivery, or renewed.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 10, 2011.

TRD-201100534
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: March 2, 2011
Proposal publication date: December 3, 2010
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER A. GENERAL RULES

30 TAC §101.1

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) adopts the amendment to §101.1.

The amendment to §101.1 is adopted *with changes* to the proposed text as published in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7676) and will be republished.

The amendment to §101.1 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Rule

The EPA rules implementing the 1997 eight-hour ozone standard did not require regulated entities to continue to use the more stringent major source thresholds and emission offset requirements of the one-hour ozone standard that previously applied to them when implementing New Source Review (NSR) and Title V permitting for the 1997 eight-hour ozone standard. The EPA rule (known as Phase I) was successfully challenged in *South Coast Air Quality Management District v. EPA (South Coast)* 472 F.3d 882 (D.C. Cir. 2006) reh'g denied 489 F.3d 1245 (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). The EPA has interpreted the court ruling as restoring NSR applicability thresholds and emission offset requirements under the one-hour ozone standard to prevent backsliding. The *South Coast* decision was upheld by the Supreme Court on January 14, 2008. TCEQ is adopting concurrent amendments to 30 TAC Chapter 116, *Control of Air Pollution by Permits for New Construction or Modification,* to make

clear the applicability of the major source thresholds and emission offset requirements.

Additionally, in order to prevent future confusion over designations and classifications and their related applicability thresholds and emissions offset requirements, TCEQ is making changes to the definitions in §101.1(54), concerning maintenance area, and §101.1(70), concerning nonattainment area. Because maintenance and nonattainment areas and their boundaries are subject to change based only on federal actions, this amendment will eliminate references to specific maintenance and nonattainment areas in favor of a more general definition that indicates the federal regulations that define these areas and the federally applicable designations and classifications. In order to ensure that the public has access to up-to-date information regarding the specific descriptions of nonattainment and maintenance areas, the commission regularly posts information regarding the designation process for new National Ambient Air Quality Standard (NAAQS) on the TCEQ public Web site.

Staff has previously presented this rule amendment (Rule Project 2008-030-116-PR) to the commission for consideration. At the February 25, 2009, commissioner's agenda, the commission remanded the rule project to the executive director's staff in anticipation of additional direction or action by the EPA, because EPA continued to indicate in various federal notices its intent to complete rulemaking regarding NSR anti-backsliding requirements after the *South Coast* decision. EPA's proposed rule to implement the 1997 eight-hour ozone NAAQS revision on subpart 1 reclassification and anti-backsliding provisions under the former one-hour ozone standard was published in the January 16, 2009, *Federal Register,* but has not yet been finalized. This rulemaking removes language regarding the exemptions from nonattainment new source review (NNSR) that were vacated by *South Coast.*

On September 23, 2009, the EPA published notice of the proposed disapproval of past revisions to the Texas NNSR SIP (74 *Federal Register* 48467) that are related to this rule amendment, and finalized this disapproval on September 15, 2010 (75 *Federal Register* 56424). Additionally, on October 20, 2010, EPA published a final rule to approve the redesignation of the Beaumont-Port Arthur (BPA) 1997 eight-hour ozone nonattainment area to attainment, and clarify EPA's previous approval of the El Paso §110(a)(1) maintenance plan for the 1997 eight-hour ozone standard (see 75 *Federal Register* 64675, October 20, 2010). This final rule noted EPA's new position regarding NSR anti-backsliding and whether one-hour ozone major source thresholds and emission offset requirements continue to apply in an area. EPA noted "after final redesignation to attainment for the 1997 eight-hour ozone standard, EPA does not require the continued application of one-hour anti-backsliding nonattainment NSR, if Texas interprets its SIP as applying prevention of significant deterioration (PSD) to BPA in these circumstances" (See 75 *Federal Register* 64675 and 64677, October 20, 2010). The EPA also clarified that, with respect to El Paso, "EPA has had further opportunity to consider the applicable statutory and regulatory provisions and the decision in South Coast.... As a result, we no longer believe that the Clean Air Act requires a separate 110(l) analysis to replace one-hour nonattainment NSR with PSD once an area has been redesignated to attainment for the 1997 eight-hour ozone standard, or has an approved 110(a)(1) maintenance plan for that standard. In sum, we believe that the approach to the nonattainment NSR/PSD transition that we are adopting here with respect to BPA should also be extended to El Paso. Thus, as long as the Texas NSR SIP is clear that the PSD SIP requirements apply to an area such as El Paso, then that is all that is required by EPA" (See 75 *Federal Register* 64675, 64677, October 20, 2010). The commission appreciates this clear statement from EPA, and agrees that the SIP should be clear on this issue. Therefore, as discussed in this preamble, although the Texas SIP has always applied PSD in an area upon redesignation, the commission is concurrently adopting changes to Chapter 116 to make clear that PSD applies once an area has been redesignated to attainment for a particular criteria pollutant.

The concurrent amendments to Chapter 116 confirm that the BPA area is no longer subject to NNSR. As discussed previously in this preamble, on October 20, 2010, EPA published the redesignation of the BPA area to attainment for the 1997 eight-hour ozone NAAQS, and a determination that the BPA area had attained the one-hour ozone NAAQS. In this action, EPA determined that the BPA area need not be subject to NNSR as an anti-backsliding requirement. Thus, under the amendment to §116.150(a)(1), the BPA area is not subject to NNSR for either the one-hour ozone or 1997 eight-hour ozone NAAQS. Additionally, the concurrent amendments to Chapter 116 confirm that the El Paso area is no longer subject to NNSR. On January 15, 2009, EPA published its approval of a maintenance plan for the El Paso area for the 1997 eight-hour ozone standard. As discussed previously in this preamble, in EPA's October 20, 2010, action for the BPA area, EPA stated that "we no longer believe that the Clean Air Act requires a separate 110(l) analysis to replace 1-hour nonattainment NSR with PSD once an area has...an approved 110(a)(1) maintenance plan for that standard" (see 75 *Federal Register* 64677). Taken together, these statements reflect an EPA determination that NNSR is no longer required for purposes of anti-backsliding for the El Paso area. Thus, under the amendment to §116.150(a)(4), the El Paso area is not subject to NNSR for either the one-hour ozone or 1997 eight-hour ozone NAAQS.

This is an issue of extreme importance to the commission, the regulated community, and the public, and there should be no room for ambiguity or argument. In an effort to ensure that TCEQ regulatory requirements regarding the NNSR permitting program meet the requirements of the Federal Clean Air Act (FCAA) and are approvable into the SIP, the commission is adopting an amendment to provide clarity and eliminate any deficiencies that would prevent approval of the rule changes.

Section Discussion

§101.1, Definitions

The commission is amending the definition of maintenance area in §101.1(54). This amendment removes the specific descriptions of maintenance areas within the state in favor of a more general definition that makes clear that these areas are designated by federal action. Similarly, the commission is amending the definition of nonattainment areas in §101.1(70) to remove all references to specific nonattainment areas in §101.1(70)(A) - (G) and retain those parts of the definition that refer to federal regulations and the *Federal Register.* These changes help ensure that when changes are made to maintenance areas and nonattainment areas as a result of federal action, these rules will not be rendered incorrect. Also, for the one-hour ozone NAAQS, the designations and classifications in 40 Code of Federal Regulations (CFR) Part 81 were retained by EPA for purposes of anti-backsliding (See 70 *Federal Register* 44470, August 3, 2005). Upon determination by EPA that any requirement

is no longer required for purposes of anti-backsliding, the requirement will no longer apply. The commission is also removing the language "to prevent anti-backsliding" and replacing it with "for the purposes of anti-backsliding" since the intent of the rule is to prevent backsliding and promote anti-backsliding. Any revision to a SIP that could interfere with or does not comply with the FCAA and the SIP because it has the effect of making the approved SIP less stringent may be considered as "backsliding" from those requirements and would not be approvable by the EPA. Additionally, the definition of reportable quantity contains references to §101.1(70) in §101.1(88)(A)(i)(III)(-a-), (-c-), (-w-), (-pp-), and (-zz-) that would be incorrect based on the amendments to §101.1(70). The commission is amending §101.1(88) to correct these references.

Final Regulatory Impact Analysis

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period, but no comments were received. The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the revisions are to add references to federal regulations in certain definitions that are duplicative with federal regulation that the state has no authority to legally change, and to correct references in the definition of reportable quantity. These changes will not adversely affect the economy, a sector or the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state in a material way because they are administrative in nature.

Additionally, even if the rule met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rule would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to revise their plans as necessary to take account revisions of the NAAQS. The rule revisions will align the state rules with federal requirements that the state has no authority to change, since the FCAA reserves all authority concerning designations and classifications for the EPA only, in addition to correcting internal references in the rules

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While this rule may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the rule does not exceed the requirement to attain and maintain the NAAQS. For these reasons, this rule falls under the exception in Texas Government Code, §2001.0225(a), because it is required by, and does not exceed, federal law including the approved SIP. In addition, these rules do not exceed any contract between the state and a federal agency.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that

"when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *(Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ). Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The rule implements requirements of the FCAA, specifically 42 USC, §7410. The specific intent of the revisions is to add references to federal regulations in certain definitions that are duplicative with federal regulation that the state has no authority to legally change, and to correct an inadvertent omission in the definition of reportable quantity. The amendment was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, and 382.017. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

No comments were received on the RIA.

Taking Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the rulemaking action under Texas Government Code, §2007.043. The primary purpose of this rulemaking action, as discussed elsewhere in this preamble, is to add references to federal regulations in certain definitions that are duplicative with federal regulation that the state has no authority to legally change, and to correct an inadvertent omission in the definition of reportable quantity. The rule will not create any additional burden on private real property. The rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. This rule also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Plan. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The amendment replaces existing definitions with references to federal regulations that the state has no authority to change and correct an inadvertent omission in the definition of reportable quantity. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 101, Subchapter A is an applicable requirement of 30 TAC Chapter 122, Federal Operating Permits Program, in that the definitions in Subchapter A are relevant in defining and understanding other applicable requirements and applicability generally. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include any new requirements or address applicability related to the new Chapter 101 requirements.

Public Comment

The commission held a public hearing on September 20, 2010, in Austin and no comments were submitted at the hearing. The comment period closed on September 27, 2010. The commission received written comments from the Texas Industry Project (TIP) and Zephyr Environmental Corp. (ZEC).

Response to Comments

TIP commented that this rulemaking was unnecessary to ensure anti-backsliding for any Texas ozone nonattainment area,

because it would be superseded by a pending EPA rulemaking, and because it would create an undue hardship for businesses.

The commission respectfully disagrees with the comments. Due to EPA's inconsistent positions on anti-backsliding requirements and failure to complete rulemaking to fully implement the D.C. Circuit's opinion in *South Coast v. EPA,* as discussed earlier in this preamble, there has been confusion and concern regarding anti-backsliding requirements, as reflected in other comments received on this rulemaking. This rulemaking is necessary to remove prior adopted rule language that conflicted with then-applicable EPA guidance regarding applicability of major source thresholds and emission offset requirements. The commission constantly strives for clarity in its rules, in order for all interested persons to both understand and implement commission rules appropriately under state law. As discussed earlier in this preamble, EPA has issued a final rule redesignating the BPA area as attainment for the 1997 eight-hour ozone standard, and discussing NSR requirements that apply in the BPA area as of October 20, 2010, (75 *Federal Register* 64675). While this final rule provides additional guidance regarding EPA's opinions concerning anti-backsliding requirements, this rule does not have general applicability, and therefore, does not resolve these issues statewide, as assumed by the commenter. Regarding the commenter's concern that the rule, if adopted, would create an undue hardship for business, the commenter provided no information to support either the type or scope of hardship. No changes were made to the rule in response to these comments.

Zephyr commented that removal of specific definitions and referencing federal regulations would not accomplish the stated goal of reducing confusion over nonattainment area designations and classifications and their related applicability thresholds and emission offset requirements.

The commission appreciates the comments, and notes that the removal of the specific definitions to reference the applicable federal regulation is only one element of the commission's proposed strategy for clarity regarding anti-backsliding requirements. As stated elsewhere in this preamble, the commission is adopting rule changes to both Chapters 101 and 116 to provide clarity regarding the applicability thresholds and emission offset provisions.

Zephyr also commented that the current TCEQ Web site postings were inadequate to prevent confusion over nonattainment area designations and classifications, requested that the TCEQ specify in this response to comments additional items related to nonattainment issues that would be included on the website, and requested specific items, such as "links to all documents establishing air quality permitting requirements."

The commission appreciates the comment, and will consider how to better provide information on these issues to the public.

Statutory Authority

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code and under Texas Health and Safety Code, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the proper control of the state's air.

The adopted amendment implements Texas Water Code, §5.103; and Texas Health and Safety Code, §382.017 and §382.012.

§101.1. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in the air quality rules in this title, have the following meanings, unless the context clearly indicates otherwise.

(1) Account--For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

(2) Acid gas flare--A flare used exclusively for the incineration of hydrogen sulfide and other acidic gases derived from natural gas sweetening processes.

(3) Agency established facility identification number--For the purposes of Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity that the emission inventory reporting requirements of §101.10 of this title (relating to Emissions Inventory Requirements) are applicable to each facility at that regulated entity.

(4) Ambient air--That portion of the atmosphere, external to buildings, to which the general public has access.

(5) Background--Background concentration, the level of air contaminants that cannot be reduced by controlling emissions from man-made sources. It is determined by measuring levels in non-urban areas.

(6) Boiler--Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) Capture system--All equipment (including, but not limited to, hoods, ducts, fans, booths, ovens, dryers, etc.) that contains, collects, and transports an air pollutant to a control device.

(8) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(9) Carbon adsorber--An add-on control device that uses activated carbon to adsorb volatile organic compounds from a gas stream.

(10) Carbon adsorption system--A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(11) Coating--A material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, adhesives, thinners, diluents, inks, maskants, and temporary protective coatings.

(12) Cold solvent cleaning--A batch process that uses liquid solvent to remove soils from the surfaces of parts or to dry the parts by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. Wipe cleaning (hand cleaning) is not included in this definition.

(13) Combustion unit--Any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles.

(14) Combustion turbine--Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft will be treated as one unit.

(15) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility that disposes only waste generated on-site or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(16) Commercial incinerator--An incinerator used to dispose of waste material from retail and wholesale trade establishments.

(17) Commercial medical waste incinerator--A facility that accepts for incineration medical waste generated outside the property boundaries of the facility.

(18) Component--A piece of equipment, including, but not limited to, pumps, valves, compressors, and pressure relief valves that has the potential to leak volatile organic compounds.

(19) Condensate--Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates.

(20) Construction-demolition waste--Waste resulting from construction or demolition projects.

(21) Control system or control device--Any part, chemical, machine, equipment, contrivance, or combination of same, used to destroy, eliminate, reduce, or control the emission of air contaminants to the atmosphere.

(22) Conveyorized degreasing--A solvent cleaning process that uses an automated parts handling system, typically a conveyor, to automatically provide a continuous supply of parts to be cleaned or dried using either cold solvent or vaporized solvent. A conveyorized degreasing process is fully enclosed except for the conveyor inlet and exit portals.

(23) Criteria pollutant or standard--Any pollutant for which there is a national ambient air quality standard established under 40 Code of Federal Regulations Part 50.

(24) Custody transfer--The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(25) *De minimis* impact--A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source that has undergone a major modification that does not exceed the following specified amounts.

Figure: 30 TAC §101.1(25) (No change.)

(26) Domestic wastes--The garbage and rubbish normally resulting from the functions of life within a residence.

(27) Emissions banking--A system for recording emissions reduction credits so they may be used or transferred for future use.

(28) Emissions event--Any upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.

(29) Emissions reduction credit--Any stationary source emissions reduction that has been banked in accordance with Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading).

(30) Emissions reduction credit certificate--The certificate issued by the executive director that indicates the amount of qualified reduction available for use as offsets and the length of time the reduction is eligible for use.

(31) Emissions unit--Any part of a stationary source that emits, or would have the potential to emit, any pollutant subject to regulation under the Federal Clean Air Act.

(32) Excess opacity event--When an opacity reading is equal to or exceeds 15 additional percentage points above an applicable opacity limit, averaged over a six-minute period.

(33) Exempt solvent--Those carbon compounds or mixtures of carbon compounds used as solvents that have been excluded from the definition of volatile organic compound.

(34) External floating roof--A cover or roof in an open top tank that rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them.

(35) Federal motor vehicle regulation--Control of Air Pollution from Motor Vehicles and Motor Vehicle Engines, 40 Code of Federal Regulations Part 85.

(36) Federally enforceable--All limitations and conditions that are enforceable by the United States Environmental Protection Agency administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts 60 and 61; requirements within any applicable state implementation plan (SIP); and any permit requirements established under 40 CFR §52.21 or under regulations approved under 40 CFR Part 51, Subpart 1, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program.

(37) Flare--An open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame, and that is used as a control device. A flare may be equipped with a radiant heat shield (with or without a refractory lining), but is not equipped with a flame air control damping system to control the air/fuel mixture. In addition, a flare may also use auxiliary fuel. The combustion flame may be elevated or at ground level. A vapor combustor, as defined in this section, is not considered a flare.

(38) Fuel oil--Any oil meeting the American Society for Testing and Materials (ASTM) specifications for fuel oil in ASTM D396-01, Standard Specifications for Fuel Oils, revised 2001. This includes fuel oil grades 1, 1 (Low Sulfur), 2, 2 (Low Sulfur), 4 (Light), 4, 5 (Light), 5 (Heavy), and 6.

(39) Fugitive emission--Any gaseous or particulate contaminant entering the atmosphere that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(40) Garbage--Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, and handling and sale of produce and other food products.

(41) Gasoline--Any petroleum distillate having a Reid vapor pressure of four pounds per square inch (27.6 kilopascals) or greater that is produced for use as a motor fuel, and is commonly called gasoline.

(42) Hazardous wastes--Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.,* as amended.

(43) Heatset (used in offset lithographic printing)--Any operation where heat is required to evaporate ink oil from the printing ink. Hot air dryers are used to deliver the heat.

(44) High-bake coatings--Coatings designed to cure at temperatures above 194 degrees Fahrenheit.

(45) High-volume low-pressure spray guns--Equipment used to apply coatings by means of a spray gun that operates between 0.1 and 10.0 pounds per square inch gauge air pressure measured at the air cap.

(46) Incinerator--An enclosed combustion apparatus and attachments that is used in the process of burning wastes for the primary purpose of reducing its volume and weight by removing the combustibles of the waste and is equipped with a flue for conducting products of combustion to the atmosphere. Any combustion device that burns 10% or more of solid waste on a total British thermal unit (Btu) heat input basis averaged over any one-hour period is considered to be an incinerator. A combustion device without instrumentation or methodology to determine hourly flow rates of solid waste and burning 1.0% or more of solid waste on a total Btu heat input basis averaged annually is also considered to be an incinerator. An open-trench type (with closed ends) combustion unit may be considered an incinerator when approved by the executive director. Devices burning untreated wood scraps, waste wood, or sludge from the treatment of wastewater from the process mills as a primary fuel for heat recovery are not included under this definition. Combustion devices permitted under this title as combustion devices other than incinerators will not be considered incinerators for application of any rule within this title provided they are installed and operated in compliance with the condition of all applicable permits.

(47) Industrial boiler--A boiler located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes.

(48) Industrial furnace--Cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting, or refining furnaces, including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, or foundry furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and other devices the commission may list.

(49) Industrial solid waste--Solid waste resulting from, or incidental to, any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class 1 industrial solid waste or Class 1 waste is any industrial solid waste designated as Class 1 by the executive director as any industrial solid waste or mixture of industrial solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in §335.1 and §335.505 of this title (relating to Definitions and Class 1 Waste Determination).

(B) Class 2 industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class 1 or Class 3, as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(C) Class 3 industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in §335.507 of this title (relating to Class 3 Waste Determination).

(50) Internal floating cover--A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell.

(51) Leak--A volatile organic compound concentration greater than 10,000 parts per million by volume or the amount specified by applicable rule, whichever is lower; or the dripping or exuding of process fluid based on sight, smell, or sound.

(52) Liquid fuel--A liquid combustible mixture, not derived from hazardous waste, with a heating value of at least 5,000 British thermal units per pound.

(53) Liquid-mounted seal--A primary seal mounted in continuous contact with the liquid between the tank wall and the floating roof around the circumference of the tank.

(54) Maintenance area--A geographic region of the state previously designated nonattainment under the Federal Clean Air Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under 42 United States Code, §7505a, as described in 40 Code of Federal Regulations Part 81and in pertinent *Federal Register* notices.

(55) Maintenance plan--A revision to the applicable state implementation plan, meeting the requirements of 42 United States Code, §7505a.

(56) Marine vessel--Any watercraft used, or capable of being used, as a means of transportation on water, and that is constructed or adapted to carry, or that carries, oil, gasoline, or other volatile organic liquid in bulk as a cargo or cargo residue.

(57) Mechanical shoe seal--A metal sheet that is held vertically against the storage tank wall by springs or weighted levers and is connected by braces to the floating roof. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

(58) Medical waste--Waste materials identified by the Department of State Health Services as "special waste from health care-re-

lated facilities" and those waste materials commingled and discarded with special waste from health care-related facilities.

(59) Metropolitan Planning Organization--That organization designated as being responsible, together with the state, for conducting the continuing, cooperative, and comprehensive planning process under 23 United States Code (USC), §134 and 49 USC, §1607.

(60) Mobile emissions reduction credit--The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state rules) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter F of this title (relating to Vehicle Retirement and Mobile Emission Reduction Credits), and that has been banked in accordance with Subchapter H, Division 1 of this chapter.

(61) Motor vehicle--A self-propelled vehicle designed for transporting persons or property on a street or highway.

(62) Motor vehicle fuel dispensing facility--Any site where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks.

(63) Municipal solid waste--Solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste except industrial solid waste.

(64) Municipal solid waste facility--All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(65) Municipal solid waste landfill--A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under 40 Code of Federal Regulations §257.2. A municipal solid waste landfill (MSWLF) unit also may receive other types of Resource Conservation and Recovery Act Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(66) National ambient air quality standard--Those standards established under 42 United States Code, §7409, including standards for carbon monoxide, lead, nitrogen dioxide, ozone, inhalable particulate matter, and sulfur dioxide.

(67) Net ground-level concentration--The concentration of an air contaminant as measured at or beyond the property boundary minus the representative concentration flowing onto a property as measured at any point. Where there is no expected influence of the air contaminant flowing onto a property from other sources, the net ground level concentration may be determined by a measurement at or beyond the property boundary.

(68) New source--Any stationary source, the construction or modification of which was commenced after March 5, 1972.

(69) Nitrogen oxides (NOX)--The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(70) Nonattainment area--A defined region within the state that is designated by the United States Environmental Protection Agency (EPA) as failing to meet the national ambient air quality standard (NAAQS or standard) for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of 42 United States Code, §7407(d). For the official list and boundaries of nonattainment areas, see 40 Code of Federal Regulations (CFR) Part 81 and pertinent *Federal Register* notices. The designations and classifications for the one-hour ozone national ambient air quality standard in 40 CFR Part 81 were retained for the purpose of anti-backsliding and upon determination by the EPA that any requirement is no longer required for purposes of anti-backsliding, then that requirement no longer applies.

(71) Non-reportable emissions event--Any emissions event that in any 24-hour period does not result in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(72) Opacity--The degree to which an emission of air contaminants obstructs the transmission of light expressed as the percentage of light obstructed as measured by an optical instrument or trained observer.

(73) Open-top vapor degreasing--A batch solvent cleaning process that is open to the air and that uses boiling solvent to create solvent vapor used to clean or dry parts through condensation of the hot solvent vapors on the parts.

(74) Outdoor burning--Any fire or smoke-producing process that is not conducted in a combustion unit.

(75) Particulate matter--Any material, except uncombined water, that exists as a solid or liquid in the atmosphere or in a gas stream at standard conditions.

(76) Particulate matter emissions--All finely-divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by United States Environmental Protection Agency Reference Method 5, as specified at 40 Code of Federal Regulations (CFR) Part 60, Appendix A, modified to include particulate caught by an impinger train; by an equivalent or alternative method, as specified at 40 CFR Part 51; or by a test method specified in an approved state implementation plan.

(77) Petroleum refinery--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(78) PM_{10}--Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on 40 Code of Federal Regulations (CFR) Part 50, Appendix J, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(79) PM_{10} emissions--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan.

(80) Polychlorinated biphenyl compound--A compound subject to 40 Code of Federal Regulations Part 761.

(81) Process or processes--Any action, operation, or treatment embracing chemical, commercial, industrial, or manufacturing factors such as combustion units, kilns, stills, dryers, roasters, and equipment used in connection therewith, and all other methods or forms

of manufacturing or processing that may emit smoke, particulate matter, gaseous matter, or visible emissions.

(82) Process weight per hour--"Process weight" is the total weight of all materials introduced or recirculated into any specific process that may cause any discharge of air contaminants into the atmosphere. Solid fuels charged into the process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not. The "process weight per hour" will be derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given process to the completion thereof, excluding any time during that the equipment used to conduct the process is idle. For continuous operation, the "process weight per hour" will be derived by dividing the total process weight for a 24-hour period by 24.

(83) Property--All land under common control or ownership coupled with all improvements on such land, and all fixed or movable objects on such land, or any vessel on the waters of this state.

(84) Reasonable further progress--Annual incremental reductions in emissions of the applicable air contaminant that are sufficient to provide for attainment of the applicable national ambient air quality standard in the designated nonattainment areas by the date required in the state implementation plan.

(85) Regulated entity--All regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. The term includes any property under common ownership or control identified in a permit or used in conjunction with the regulated activity at the same street address or location. Owners or operators of pipelines, gathering lines, and flowlines under common ownership or control in a particular county may be treated as a single regulated entity for purposes of assessment and regulation of emissions events.

(86) Remote reservoir cold solvent cleaning--Any cold solvent cleaning operation in which liquid solvent is pumped to a sink-like work area that drains solvent back into an enclosed container while parts are being cleaned, allowing no solvent to pool in the work area.

(87) Reportable emissions event--Any emissions event that in any 24-hour period, results in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(88) Reportable quantity (RQ)--Is as follows:

(A) for individual air contaminant compounds and specifically listed mixtures by name or Chemical Abstracts Service (CAS) number, either:

(i) the lowest of the quantities:

(I) listed in 40 Code of Federal Regulations (CFR) Part 302, Table 302.4, the column "final RQ";

(II) listed in 40 CFR Part 355, Appendix A, the column "Reportable Quantity"; or

(III) listed as follows:

(-a-) acetaldehyde - 1,000 pounds, except in the Houston-Galveston-Brazoria (HGB) and Beaumont-Port Arthur (BPA) ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-b-) butanes (any isomer) - 5,000 pounds;

(-c-) butenes (any isomer, except 1,3-butadiene) - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-d-) carbon monoxide - 5,000 pounds;

(-e-) 1-chloro-1,1-difluoroethane (HCFC-142b) - 5,000 pounds;

(-f-) chlorodifluoromethane (HCFC-22) - 5,000 pounds;

(-g-) 1-chloro-1-fluoroethane (HCFC-151a) - 5,000 pounds;

(-h-) chlorofluoromethane (HCFC-31) - 5,000 pounds;

(-i-) chloropentafluoroethane (CFC-115) - 5,000 pounds;

(-j-) 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124) - 5,000 pounds;

(-k-) 1-chloro-1,1,2,2 tetrafluoroethane (HCFC-124a) - 5,000 pounds;

(-l-) 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee) - 5,000 pounds;

(-m-) decanes (any isomer) - 5,000 pounds;

(-n-) 1,1-dichloro-1-fluoroethane (HCFC-141b) - 5,000 pounds;

(-o-) 3,3-dichloro-1,1,2,2-pentafluoropropane (HCFC-225ca) - 5,000 pounds;

(-p-) 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb) - 5,000 pounds;

(-q-) 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFR-114) - 5,000 pounds;

(-r-) 1,1-dichlorotetrafluoroethane (CFC-114a) - 5,000 pounds;

(-s-) 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a) - 5,000 pounds;

(-t-) 1,1-difluoroethane (HFC-152a) - 5,000 pounds;

(-u-) difluoromethane (HFC-32) - 5,000 pounds;

(-v-) ethanol - 5,000 pounds;

(-w-) ethylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-x-) ethylfluoride (HFC-161) - 5,000 pounds;

(-y-) 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea) - 5,000 pounds;

(-z-) 1,1,1,3,3,3-hexafluoropropane (HFC-236fa) - 5,000 pounds;

(-aa-) 1,1,1,2,3,3-hexafluoropropane (HFC-236ea) - 5,000 pounds;

(-bb-) hexanes (any isomer) - 5,000 pounds;

(-cc-) isopropyl alcohol - 5,000 pounds;

(-dd-) mineral spirits - 5,000 pounds;

(-ee-) octanes (any isomer) - 5,000 pounds;

(-ff-) oxides of nitrogen - 200 pounds in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County, and 5,000 pounds in all other areas of the state, which should be used instead of the RQs for nitrogen oxide and nitrogen dioxide provided in 40 CFR Part 302, Table 302.4, the column "final RQ";

(-gg-) pentachlorofluoroethane (CFR-111) - 5,000 pounds;

(-hh-) 1,1,1,3,3-pentafluorobutane (HFC-365mfc) - 5,000 pounds;

(-ii-) pentafluoroethane (HFC-125) - 5,000 pounds;

(-jj-) 1,1,2,2,3-pentafluoropropane (HFC-245ca) - 5,000 pounds;

(-kk-) 1,1,2,3,3-pentafluoropropane (HFC-245ea) - 5,000 pounds;

(-ll-) 1,1,1,2,3-pentafluoropropane (HFC-245eb) - 5,000 pounds;

(-mm-) 1,1,1,3,3-pentafluoropropane (HFC-245fa) - 5,000 pounds;

(-nn-) pentanes (any isomer) - 5,000 pounds;

(-oo-) propane - 5,000 pounds;

(-pp-) propylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-qq-) 1,1,2,2-terachlorodifluoroethane (CFR-112) - 5,000 pounds;

(-rr-) 1,1,1,2-tetrachlorodifluoroethane (CFC-112a) - 5,000 pounds;

(-ss-) 1,1,2,2-tetrafluoroethane (HFC-134) - 5,000 pounds;

(-tt-) 1,1,1,2-tetrafluoroethane (HFC-134a) - 5,000 pounds;

(-uu-) 1,1,2-trichloro-1,2,2-trifluoroethane (CFR-113) - 5,000 pounds;

(-vv-) 1,1,1-trichloro-2,2,2-trilfloroethane (CFC-113a) - 5,000 pounds;

(-ww-) 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123) - 5,000 pounds;

(-xx-) 1,1,1-trifluoroethane (HFC-143a) - 5,000 pounds;

(-yy-) trifluoromethane (HFC-23) - 5,000 pounds; or

(-zz-) toluene - 1,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(ii) if not listed in clause (i) of this subparagraph, 100 pounds;

(B) for mixtures of air contaminant compounds:

(i) where the relative amount of individual air contaminant compounds is known through common process knowledge or prior engineering analysis or testing, any amount of an individual air contaminant compound that equals or exceeds the amount specified in subparagraph (A) of this paragraph;

(ii) where the relative amount of individual air contaminant compounds in subparagraph (A)(i) of this paragraph is not known, any amount of the mixture that equals or exceeds the amount for any single air contaminant compound that is present in the mixture and listed in subparagraph (A)(i) of this paragraph;

(iii) where each of the individual air contaminant compounds listed in subparagraph (A)(i) of this paragraph are known to be less than 0.02% by weight of the mixture, and each of the other individual air contaminant compounds covered by subparagraph (A)(ii) of this paragraph are known to be less than 2.0% by weight of the mixture, any total amount of the mixture of air contaminant compounds greater than or equal to 5,000 pounds; or

(iv) where natural gas excluding carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen or air emissions from crude oil are known to be in an amount greater than or equal to 5,000 pounds or the associated hydrogen sulfide and mercaptans in a total amount greater than 100 pounds, whichever occurs first;

(C) for opacity from boilers and combustion turbines as defined in this section fueled by natural gas, coal, lignite, wood, fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, opacity that is equal to or exceeds 15 additional percentage points above the applicable limit, averaged over a six-minute period. Opacity is the only RQ applicable to boilers and combustion turbines described in this paragraph; or

(D) for facilities where air contaminant compounds are measured directly by a continuous emission monitoring system providing updated readings at a minimum 15-minute interval an amount, approved by the executive director based on any relevant conditions and a screening model, that would be reported prior to ground level concentrations reaching at any distance beyond the closest regulated entity property line:

(i) less than one-half of any applicable ambient air standards; and

(ii) less than two times the concentration of applicable air emission limitations.

(89) Rubbish--Nonputrescible solid waste, consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and like materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(90) Scheduled maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity (RQ), a scheduled maintenance, startup, or shutdown activity is an activity that the owner or operator of the regulated entity whether performing or otherwise affected by the activity, provides prior notice and a final report as required by §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in §101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the initial notification by more than an RQ. For activities with unauthorized emissions that are not expected to, and do not, exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by §101.211 of this title. Expected excess opacity events as described in §101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) resulting from scheduled maintenance, startup, or shutdown activities are those that provide prior notice (if required), and are recorded and reported as required by §101.211 of this title.

(91) Sludge--Any solid or semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant; water supply treatment plant, exclusive of the treated effluent from a wastewater treatment plant; or air pollution control equipment.

(92) Smoke--Small gas-born particles resulting from incomplete combustion consisting predominately of carbon and other combustible material and present in sufficient quantity to be visible.

(93) Solid waste--Garbage, rubbish, refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control equipment, and other discarded material, including solid, liquid, semisolid, or containerized gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial dis-

charges subject to regulation by permit issued under the Texas Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land, if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas, or geothermal resources, and other substance or material regulated by the Railroad Commission of Texas under Natural Resources Code, §91.101, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, as amended (42 United States Code, §§6901 *et seq.).*

(94) Sour crude--A crude oil that will emit a sour gas when in equilibrium at atmospheric pressure.

(95) Sour gas--Any natural gas containing more than 1.5 grains of hydrogen sulfide per 100 cubic feet, or more than 30 grains of total sulfur per 100 cubic feet.

(96) Source--A point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

(97) Special waste from health care-related facilities--A solid waste that if improperly treated or handled, may serve to transmit infectious disease(s) and that is comprised of the following: animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps.

(98) Standard conditions--A condition at a temperature of 68 degrees Fahrenheit (20 degrees Centigrade) and a pressure of 14.7 pounds per square inch absolute (101.3 kiloPascals).

(99) Standard metropolitan statistical area--An area consisting of a county or one or more contiguous counties that is officially so designated by the United States Bureau of the Budget.

(100) Submerged fill pipe--A fill pipe that extends from the top of a tank to have a maximum clearance of six inches (15.2 centimeters) from the bottom or, when applied to a tank that is loaded from the side, that has a discharge opening entirely submerged when the pipe used to withdraw liquid from the tank can no longer withdraw liquid in normal operation.

(101) Sulfur compounds--All inorganic or organic chemicals having an atom or atoms of sulfur in their chemical structure.

(102) Sulfuric acid mist/sulfuric acid--Emissions of sulfuric acid mist and sulfuric acid are considered to be the same air contaminant calculated as H_2SO_4 and must include sulfuric acid liquid mist, sulfur trioxide, and sulfuric acid vapor as measured by Test Method 8 in 40 Code of Federal Regulations Part 60, Appendix A.

(103) Sweet crude oil and gas--Those crude petroleum hydrocarbons that are not "sour" as defined in this section.

(104) Total suspended particulate--Particulate matter as measured by the method described in 40 Code of Federal Regulations Part 50, Appendix B.

(105) Transfer efficiency--The amount of coating solids deposited onto the surface or a part of product divided by the total amount of coating solids delivered to the coating application system.

(106) True vapor pressure--The absolute aggregate partial vapor pressure, measured in pounds per square inch absolute, of all volatile organic compounds at the temperature of storage, handling, or processing.

(107) Unauthorized emissions--Emissions of any air contaminant except carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Clean Air Act, §382.0518(g).

(108) Unplanned maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity or with excess opacity, an unplanned maintenance, startup, or shutdown activity is:

(A) a startup or shutdown that was not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit; or

(B) a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that requires the immediate corrective action to minimize or avoid an upset or malfunction.

(109) Upset event--An unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event.

(110) Utility boiler--A boiler used to produce electric power, steam, or heated or cooled air, or other gases or fluids for sale.

(111) Vapor combustor--A partially enclosed combustion device used to destroy volatile organic compounds by smokeless combustion without extracting energy in the form of process heat or steam. The combustion flame may be partially visible, but at no time does the device operate with an uncontrolled flame. Auxiliary fuel and/or a flame air control damping system that can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.

(112) Vapor-mounted seal--A primary seal mounted so there is an annular space underneath the seal. The annular vapor space is bounded by the bottom of the primary seal, the tank wall, the liquid surface, and the floating roof or cover.

(113) Vent--Any duct, stack, chimney, flue, conduit, or other device used to conduct air contaminants into the atmosphere.

(114) Visible emissions--Particulate or gaseous matter that can be detected by the human eye. The radiant energy from an open flame is not considered a visible emission under this definition.

(115) Volatile organic compound--As defined in 40 Code of Federal Regulations §51.100(s), except §51.100(s)(2) - (4), as amended on November 29, 2004 (69 FR 69290).

(116) Volatile organic compound (VOC) water separator--Any tank, box, sump, or other container in which any VOC, floating on or contained in water entering such tank, box, sump, or other container, is physically separated and removed from such water prior to outfall, drainage, or recovery of such water.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100544
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Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 3, 2011
Proposal publication date: August 27, 2010
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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) adopts the amendments to §§116.12, 116.115, 116.180, 116.182, 116.186, 116.188, 116.190, 116.192, 116.601, and 116.617; new §116.127; and the repeal of §116.121.

The amendments to §§116.115, 116.188, 116.601; new §116.127; and the repeal of §116.121 are adopted *without changes* as published in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7676) and will not be republished. Sections 116.12, 116.180, 116.182, 116.186, 116.190, 116.192, and 116.617 are adopted *with changes* to the proposed text as published in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7698) and will be republished.

The amendments to §§116.12, 116.115, 116.180, 116.182, 116.186, 116.188, 116.190, 116.192, and 116.601; and new §116.127 will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP). The amendment to §116.617 will not be submitted to EPA as a revision to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On June 10, 2005, the TCEQ submitted the amendment to §116.12 to the EPA as a revision to the New Source Review (NSR) SIP and §116.150 as a revision to the Nonattainment New Source Review (NNSR) SIP, both adopted on May 25, 2005. On February 1, 2006, the TCEQ submitted amendments to §§116.12, 116.121, 116.150, 116.180, 116.182, 116.184, 116.186, 116.188, 116.190, and 116.617 to the EPA as revisions to the NSR SIP; amendments to §§101.1, 116.150, and 116.151 as revisions to the NNSR SIP; and the amendment to §116.160 as a revision to the Prevention of Significant Deterioration (PSD) SIP, adopted on January 11, 2006. On September 23, 2009, the EPA published notice of the proposed disapproval of these revisions to the Texas SIP (74 *Federal Register* 48467) and on September 15, 2010, published the final disapproval of the revisions (75 *Federal Register* 56424).

This rulemaking and the companion rulemaking (Rule Project No. 2008-030-116-PR) address issues identified by the EPA in its September 15, 2010, final disapproval notice and ensure that TCEQ regulatory requirements regarding the NSR permitting program meet the requirements of the Federal Clean Air Act (FCAA) and are approvable into the SIP. Specifically, those concern definitions for the Plant-Wide Applicability Limit (PAL) rules and other changes to the PAL rules to meet federal requirements, including the conditions for reopening PAL permits. The rulemaking also amends §116.617, State Pollution Control Project Standard Permit (which is the existing standard permit rule), to limit when existing registrations for this standard permit can be amended or renewed and provides the deadline for final registrations under this specific standard permit. This is intended to facilitate a smooth transition between this section and the new non-rule air quality standard permit adopted concurrently by the commission. The amendments would also remove obsolete references and make non-substantive administrative changes.

EPA also disapproved §116.151 as amended in 2006, but did not provide any specific reasons for its disapproval. In its letter transmitting this rulemaking to EPA, as discussed earlier, the commission is requesting EPA consider §116.151 as amended in 2006 together with these current rule changes as revisions to the SIP.

In the September 15, 2010 notice, EPA also proposed to take no action on §§116.400 - 116.406, which were included in the 2006 rulemaking. These sections are permit requirements for compliance with FCAA, §112(g), but they are not necessary elements of the SIP. The rulemaking withdraws from EPA consideration as a revision to the SIP of §§116.400, 116.402, 116.404, and 116.406, as adopted by the commission on January 11, 2006, effective on February 1, 2006. No changes have been made to the rule text or numbering of these sections.

This rulemaking is at least as stringent as the federal rules being implemented because it includes the applicable elements of the major NSR and PAL permit programs. The rulemaking action also ensures that the rules will meet the requirements of the FCAA, which requires that the elements of the SIP be enforceable, include replicable elements, and ensure compliance and accountability. The specific changes to the PAL rules meet these basic requirements.

When EPA adopted the NSR reform rule amendments (67 *Federal Register* 80185, December 31, 2002), it expanded its requirement for states' SIP submittals of their rules that implement major NSR to require a demonstration of why both the specific major NSR permitting program requirements, including applicable definitions, are at least as stringent as EPA's regulations, if states do not adopt the specific EPA program. TCEQ's major NSR and its PAL rules do not incorporate the EPA rules by reference but they do include the basic elements of those permit programs. Therefore, this rulemaking is at least as stringent as the federal rules being implemented. As discussed elsewhere, the changes in this rulemaking are made to specifically address issues identified by EPA in its September 15, 2010, disapproval notice so that the rules can be approved as revisions to the SIP. The changes make the commission's rules as stringent as EPA's regulations. The definitions of baseline actual emissions and projected actual emissions do not include malfunction emissions, and thus are more stringent than EPA's definitions. In addition, this rulemaking action also ensures that the rules will meet the requirements of the FCAA, which requires that the elements of the SIP be enforceable, include replicable elements, and ensure compliance and accountability.

SECTION BY SECTION DISCUSSION

§116.12, Nonattainment and Prevention of Significant Deterioration Review Definitions

The commission is adopting amendments to the definitions of the terms, "baseline actual emissions," "net emissions increase," and "projected actual emissions." These amendments resolve the EPA's objection to this section of the rule.

The EPA, in its final disapproval notice, commented that the definition of baseline actual emissions differed from the federal rules because the definition did not specify that these emissions are meant to be calculated based on the average rate. The amendment specifying that the rate is an average rate would be included in §116.12(3)(A), (B), (D), and (E). The commission is also removing the term "exempted from" §116.12(3)(E) and is replacing it with "unauthorized" since emissions events were not exempt under 30 TAC Chapter 101, General Air Quality Rules, but must be reported.

The commission is making changes from the proposal to §116.12(3)(E). The EPA in its final disapproval (see September 15, 2010 (75 *Federal Register* 56424)) agreed that the inclusion of emissions events in the definition of baseline actual emissions would have the effect of inflating the baseline and narrowing the gap between the baseline actual emissions and the planned emission rate. The EPA noted that the current definition of baseline actual emissions included emissions events and stated that to be approvable the definition would have to exclude emissions events. This is because EPA noted that the definitions of "baseline actual emissions" and "projected actual emissions" must both include or exclude malfunctions emissions. However, EPA's interpretation excludes the conditional language at the end of the paragraph which limits emissions to those that have been or are being authorized and, therefore, EPA's statement that the commission is including emissions events is in error. The commission's long standing policy is not to reward emissions from emission events, which are upset events and unplanned maintenance, startup, and shutdown (MSS) activities. TCEQ's term "unplanned MSS activities" substitutes for the EPA's term "unscheduled MSS." Unplanned MSS activities are the functional equivalent of malfunctions, as are all upset emissions. EPA also objects to the use of the word "may," stating that it indicates discretion without any replicable procedures for such determinations.

Consequently, §116.12(3)(E) is being reworded to make clear that MSS emissions reported under Chapter 101 shall be included in the calculation of baseline actual emissions but only to the extent that they have been authorized or are being authorized. Because emissions events are not included, they are therefore excluded from the calculation of baseline actual emissions. The commission does not authorize emissions events, which are emissions from upsets and unscheduled MSS activities. While the current text, as adopted in 2006, implemented that long standing policy, the rule text was not written to clearly limit the inclusion of only planned MSS emissions that have been or are in the process of being authorized during a defined time period. These changes ensure, first, that there is no discretion as to inclusion of only certain planned MSS emissions (and consequently the exclusion of emissions events) in the baseline actual emissions calculation, and second, that the definitions of baseline actual emissions and projected actual emissions are compatible and are therefore approvable as revisions to the SIP.

Additionally, the commission is making changes from the proposal by reinstating in §116.12(3)(E) the phrase "or are being authorized," relating to planned MSS emissions. This phrase was proposed to be removed because the executive director expected to recommend proposal and adoption of a concurrent rulemaking that would have included mandatory authorization of MSS emissions. Since the rulemaking that would have required authorization of MSS emissions has been remanded to staff, it would be inappropriate to remove the phrase at this time. The commission's rule that provides an incentive for authorizing planned MSS emissions, §101.222(h), provides a logical time frame for identifying which planned MSS emissions should be included in the calculation of baseline actual emissions, and the ending date of the incentive program is used in this definition. Further, §116.12(3)(D) provides that non-compliant emissions are excluded. To the extent that there are planned MSS emissions that remain unauthorized on or after March 1, 2016, those will necessarily be "non-compliant" and therefore, no longer excluded from the excluded emissions in subparagraph (D). This is consistent with the commission's policy regarding authorization of planned MSS emissions. Based on the incentive schedule in §101.222(h), the TCEQ has received several hundred applications thus far for authorizing planned MSS at approximately the midway point of the schedule and, therefore, expects that the industries named in the remaining portion of the schedule will also submit applications for authorizing planned MSS over the next two years.

The commission is also adopting an amendment to the term "net emissions increase" in §116.12(20). EPA commented in the Technical Support Document related to the proposed disapproval that this definition might not match federal requirements for enforceability because it did not include a statement that the definition was federally enforceable. The commission is specifically adding the term "federally" to modify "enforceable" in §116.12(20)(C)(ii).

Additionally, the commission is amending the term "projected actual emissions" in §116.12(29) and is adopting it with changes from the proposal. The commission is replacing the phrase "unauthorized emissions from startup and shutdown activities" with "emissions from planned maintenance, startup, or shutdown activities, which were historically unauthorized and subject to reporting under Chapter 101 to the extent that they have been authorized or are being authorized." This change is necessary to ensure that this definition is compatible with the definition of "baseline actual emissions." As discussed earlier, the definition of "baseline actual emissions" is being amended to ensure that the commission's intent of what types of emissions can be included in that calculation is clear. While the commission intended that these two definitions be compatible when adopted in 2006, the EPA's comments indicated that may not be the case. The EPA commented that the term "projected actual emissions" does not include emissions from startups, shutdowns, and malfunctions. However, as stated in the original adoption preamble for this rule in 2006, the commission excluded malfunction emissions in compliance with long-standing commission policy to exclude non-compliant emissions. The EPA in its final disapproval (see September 15, 2010 (75 *Federal Register* 56424)) agreed that the inclusion of emissions events, which are similar to the federal term "malfunctions," in the definition of baseline actual emissions would be inappropriate. Further, EPA has approved definitions in other states that also exclude malfunctions; (see September 15, 2010 (75 *Federal Register* 56441)). These amendments are necessary to ensure that both definitions are approvable as revisions to the SIP.

§116.115, General and Special Conditions

The commission is amending §116.115(b)(2)(F) with a statement that emissions exceeding the maximum allowable emission rates established in a permit are not authorized and are a violation of the permit. Additionally, the commission is amending §116.115 with non-substantive administrative changes in §116.115(b)(2)(B)(iii) and (H)(i) and (c)(2)(B)(ii)(II).

§116.121, Actual to Projected Actual and Emissions Exclusion Test for Emissions Increases

The commission repealed §116.121. The text of this rule has been moved to adopted new §116.127.

§116.127, Actual to Projected Actual and Emissions Exclusion Test for Emissions

The commission is adopting §116.127 to address actual to projected actual emissions and the emissions exclusion test for emissions increases. There have been no changes to the language that was originally in §116.121. This new section requires documentation associated with the projected actual emissions rates and records of compliance as identified in the federal rule, 40 Code of Federal Regulations (CFR) §52.21. Section 116.127(a) requires a demonstration that federal NSR does not apply be submitted with any permit application or registration. This demonstration must be documented by records that include a project description, the facilities affected, and a description of the applicability test. Subsection (b) requires monitoring of emissions that could increase as a result of the project if projected actual emissions are used to determine the project emission increase at a facility.

Subsection (c) requires owners or operators of electric utility steam generating units to submit to a report to the executive director documenting the emissions for each calendar year that records are required under the actual-to-projected actual test. Subsection (d) requires owners or operators of facilities other than electric generating units to submit a report to the executive director if annual emissions exceed the baseline actual emissions by a significant amount. Subsection (e) requires records to be maintained and made available for review.

As stated in the preamble when adopted by the commission in 2006, the commission expects that projected actual emissions will be used extensively in registrations or claims for non-PSD and nonattainment NSR authorizations where a maximum allowable emission rate is not specified in the rule.

Based on the changes to the definition of projected actual emissions, discussed elsewhere in this preamble, the commission expects that this rule is approvable as a revision to the SIP.

§116.180, Applicability

The commission is removing the term "account site" from §116.180(a)(1) and replacing it with the term "existing major stationary source" to make this requirement more consistent with federal requirements. The commission is also making similar changes to §116.180(a)(3) and (4). Additionally, because the federal term "emissions unit" is defined very similarly to the term "facility" as defined in the Texas Clean Air Act (TCAA), the commission is adding the language "or emissions unit " whenever the term facility is used (i.e., §116.180(a)(3), (b) and (c)). Additionally, the commission is making a change from the proposal in this section and as used elsewhere in the commission's PAL rules, by adding the phrase "at a major stationary source" to the term "emissions unit" to ensure that the term is better understood as the EPA generally uses the term in NSR permitting. The term "emissions unit at a major stationary source" means a single piece of equipment; it does not necessarily have the same meaning as used in some of the maximum achievable control technology standards in 40 CFR Part 63. The commission is also restricting the issuance of PAL permits to existing stationary sources in §116.180(a)(5). The EPA, in its September 15, 2010, final disapproval notice stated that the current rule lacks a provision that limits applicability of a PAL to an existing major stationary source as required by the corresponding federal rule. This amendment resolves the EPA's objection to this section of the rule.

§116.182, Plant-wide Applicability Limit Permit Application

In its September 15, 2010, final notice of disapproval, the EPA stated that the term facility was vague and unenforceable and that §116.182(1) might not require all facilities emitting a PAL pollutant at a major stationary source to be included in the PAL permit application. This amendment resolves the EPA's objection to this section of the rule. Since the federal term emissions unit is defined very similarly to the term facility as defined in the TCAA, the commission is adding the language "or emissions unit at a major stationary source" when the term facility is used in §116.182(a)(1). Also, the commission is adding the phrase "at a major stationary source" where appropriate to make clear that PALs are applicable to major sources only. Additionally, as the result of comments in the EPA's final disapproval (75 *Federal Register* 56424, September 15, 2010), the commission is adding language to require that all emission units at the major stationary source that emit the PAL pollutant be included in the PAL permit application. This language ensures that the rule is consistent with the federal requirement that the TCEQ has appropriate information to review when a PAL application is submitted. This language should also ensure approvability of the rule into the SIP.

§116.186, General and Special Conditions

In its September 15, 2010, final notice of disapproval, the EPA stated that the term facility was vague and unenforceable and that §116.186 might not require all facilities emitting a PAL pollutant at a major stationary source to be included in the PAL permit. This amendment resolves the EPA's objection to this section of the rule. Since the federal term emissions unit is defined very similarly to the term facility as defined in the TCAA, the TCEQ is adding the language "or emissions unit" where the term facility is used in subsections (a) and (b)(1) and changing the word "federal" to "major" in subsection (b)(1) to clarify the type of NSR referenced in this subsection. Also, the commission is adding the phrase "at a major stationary source" where appropriate to make clear that PALs are applicable to major sources only. Also, as the result of comments in the EPA's final disapproval (75 *Federal Register* 56424, September 15, 2010), the commission is adding language to require that all emission units at the major stationary source that emit the PAL pollutant be included in the PAL permit. This language is added to ensure approvability of the rule into the SIP. Additionally, the commission is defining the term "responsible official" by referencing the definition in 30 TAC Chapter 122.

In the September 15, 2010, final disapproval notice, the EPA noted that TCEQ's rule lacked a mandate that failure of the monitoring system to meet the requirements of this section is a violation of the PAL permit. Consequently, the commission is including this requirement as adopted §116.186(b)(9). Existing subsection (b)(9) and (10) is redesignated as subsection (b)(10) and (11). In the notice, the EPA also stated that the specific monitoring definitions: continuous emissions monitoring

system (CEMS) as defined in 40 CFR §51.165(a)(1)(xxxi) and §51.166(b)(43); continuous emissions rate monitoring system as defined in 40 CFR §51.165(a)(1)(xxxiv) and §51.166(b)(46); continuous parameter monitoring system as defined in 40 CFR §51.165(a)(1)(xxxiii) and §51.166(b)(45); and predictive emissions monitoring system (PEMS) as defined in 40 CFR §51.165(a)(1)(xxxii) and §51.166(b)(44) are essential for the enforceability of and providing the means for determining compliance with a PALs program. The commission is incorporating these definitions by reference in adopted §116.186(c)(1). Existing subsection (c)(1) and (2) is redesignated as subsection (c)(2) and (3). This amendment resolves the EPA's objection to this section of the rule. Additionally, the commission is amending §116.186 with non-substantive administrative changes.

§116.188, Plant-wide Applicability Limit

The commission is amending §116.188 with non-substantive administrative changes.

§116.190, Federal Nonattainment and Prevention of Significant Deterioration Review

In its September 15, 2010, final notice of disapproval, the EPA stated that the term facility was vague and unenforceable. This amendment resolves the EPA's objection to this section of the rule. Since the federal term emissions unit is defined very similarly to the term facility as defined in the TCAA, the commission is adding the language "or emissions unit" where the term facility is used in subsection (a). Also, the commission is adding the phrase "at a major stationary" source where appropriate to make clear that PALs are applicable to major sources only and changing the word "federal" to "major" to clarify the type of NSR referenced in subsection (a).

§116.192, Amendments and Alterations

In its final disapproval notice, the EPA requested that the state include provisions relating to the reopening of a PAL by the executive director. This amendment resolves the EPA's objection to this section of the rule. The commission is including a statement that acceptance of a PAL is agreement by the permit holder to reopening the permit in subsection (c). Also, the commission is including a mandatory reopening of the permit for the purposes that are stated in §116.186(c)(1). These purposes include: the correction of typographical or calculation errors; decrease of the PAL limit to reflect creditable emissions reductions; or revision of the permit to reflect an increase in the PAL. Additionally, the commission is allowing discretionary reopening of the permit for the purposes stated in §116.186(c)(2). These purposes include: revision of the PAL to reflect newly applicable federal requirements; revision to the PAL to reflect any other enforceable requirement imposed on major stationary sources under the SIP; reduction of the PAL to avoid national ambient air quality standards (NAAQS) or PSD increment violation; or reduction of the PAL to avoid an adverse impact on a federal class I area.

As the result of comments received from the EPA on the proposed amendments the commission is changing §116.192(a)(1) and (4) to specifically state that the Best Available Control Technology (BACT) equivalent required by the rule is federal BACT as identified in §116.160(c)(1)(a). The commission is also changing §116.192(a)(2) to state clearly that all facilities contributing to an increase in emissions resulting in source's emissions equaling or exceeding its PAL are subject to appropriate PSD or NNSR authorization to ensure that a new permit or a major modification action is obtained. Finally, the commission is changing §116.192(c)(1)(C) to include a reference to 40 CFR §51.165(f)(11). These revisions will resolve the EPA's concerns regarding this section of the rule. Additionally, the commission is amending §116.192 with non-substantive administrative changes.

§116.601, Types of Standard Permits

The commission is removing language referring to specific standard permits in §116.601(a)(1) in favor of a more general statement that includes those standard permits adopted into the rule. This change will facilitate any future adoptions or repeals of standard permits that are part of Chapter 116.

§116.617, State Pollution Control Project Standard Permit

The commission is making changes from the proposal to §116.617(a)(4) and (5). The commission is amending §116.617(a)(4) to provide that the existing requirements of that paragraph will cease to be effective on March 3, 2011. The commission is also including §116.617(a)(5) which provides that, notwithstanding the requirements of §116.604, on or after March 3, 2011, no new or modified registrations will be accepted and no existing registrations will be renewed. The date in these revisions was changed from February 17, 2011 to March 3, 2011, to accurately reflect the effective date of this rule.

The EPA in its September 15, 2010, final disapproval noted its objections to the State Pollution Control Project Standard Permit (PCP) including: the PCP is a generic permit that can be used at any source including major sources; it is overly broad in that it does not specify the types of pollution control equipment it authorizes; and it allows for source specific review and case-by-case authorization. A non-rule standard permit that can be used for pollution control projects is concurrently being issued by the commission. Persons who wish to have authorization for pollution control equipment by a standard permit may use the new non-rule standard permit for pollution control equipment.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute and if it did meet the definition, would not be subject to the requirement to prepare a RIA.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the revisions is to include definitions for and make other changes to the PAL rules to meet federal requirements, including the conditions for reopening PAL permits. The rulemaking would also amend §116.617, which is the existing standard permit rule, to limit when existing registrations can be amended or renewed, and provide the deadline for final registrations under this specific standard permit. This is intended to facilitate a smooth transition between this section and the proposed new non-rule air quality standard permit.

In the September 23, 2009, notice, EPA also proposed to take no action on §§116.400 - 116.406, which were included in the 2006 rulemaking. These sections are permit requirements for compliance with FCAA, §112(g), but they are not necessary elements of the SIP. The rulemaking proposes the withdrawal from EPA consideration as a revision to the SIP of §§116.400, 116.402,

116.404, and 116.406 as adopted by the commission on January 11, 2006, effective on February 1, 2006.

These changes will not adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state in a material way because they are adopted to ensure consistency between state and federal air quality permitting requirements and can be approved as revisions to the Texas SIP. The rulemaking action ensures that the rules will meet the requirements of the FCAA, which requires that the elements of the SIP are enforceable, include replicable elements, and ensure compliance and accountability. Specifically, the rules concern definitions for and other changes to the PAL rules, including the conditions for reopening PAL permits, and that excess emissions are violations of the permit. The rulemaking also amends §116.617 to limit when existing registrations for this standard permit can be amended or renewed and provides the deadline for final registrations under this specific standard permit. This is intended to facilitate a smooth transition between this section and the new non-rule air quality standard permit adopted concurrently by the commission. The amendments would also remove obsolete references and make non-substantive administrative changes.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410, generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. One of the requirements of 42 USC, §7410, is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. Additionally, once states have developed SIPs, and those plans are approved by the EPA, the FCAA prescribes, in 42 USC, §7502(e), that the EPA, in modifying a NAAQS, shall promulgate rules that apply to all areas that have not attained the previous NAAQS that provide for controls that are no less stringent than the controls that previously applied to the area. This rulemaking will address those sections submitted as revisions to the NSR SIP and subsequently were disapproved by the EPA. Specifically, those concern definitions for and other changes to the PAL rules, and that excess emissions are violations of the permit. The rulemaking project includes the withdrawal of sections applicable to permits required for compliance with FCAA, §112(g), from EPA consideration as a revision to the SIP; although, there are no changes to rule numbering or text and, thus, are not open for comment.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis, unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts, since the rules do not exceed the requirement to attain and maintain the NAAQS. For these reasons, the rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law, including the approved SIP. In addition, these rules do not exceed any contract between the state and a federal agency.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *(Central Power & Light Co. v. Sharp,* 919 S.W.2d

485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ). Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The rules implement requirements of the FCAA, specifically to adopt and implement SIPs to attain and maintain the NAAQS, including a requirement to adopt and implement permit programs. The specific intent of the rulemaking is to address those sections submitted as revisions to the NSR SIP and subsequently were disapproved by the EPA. Specifically, those concern definitions for and other changes to the PAL rules, and that excess emissions are violations of the permit. The rulemaking would also limit when existing pollution control standard permit registrations can be amended or renewed and the deadline for final registrations under this specific standard permit. The rules were not developed solely under the general powers of the agency, but are authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the TCAA), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for this rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this rulemaking action, as discussed elsewhere in this preamble, is to address those sections submitted as revisions to the NSR SIP and subsequently were disapproved by the EPA. Specifically, the changes concern definitions for and other changes to the PAL rules, limitations regarding use of pollution control standard permit registrations, and that excess emissions are violations of the permit.

The rules will not create any additional burden on private real property. The rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)) The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). The rules will benefit the environment by ensuring that certain state and federal permitting requirements are consistent to ensure protection of air quality. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 116 is an applicable requirement of Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements. Additionally, sources subject to the rules may become subject to the federal operating permit program.

PUBLIC COMMENT

The commission held a public hearing on September 20, 2010, and no comments were submitted. The comment period closed on September 27, 2010. The commission received written comments from an individual citizen, EAP, and the Texas Industry Project (TIP).

RESPONSE TO COMMENTS

TIP supported the revisions and clarifications to Chapter 116 that further the goal of federally approvable rules.

The commission appreciates the TIP's support on this issue.

An individual citizen requested all existing permits, especially those related to oil and gas facilities, be subject to the rule changes.

This rulemaking implements the applicable elements of the major NSR and PAL permit programs and is at least as stringent as the federal rules and policies. The rulemaking action also ensures that TCEQ rules will meet the conditions of FCAA, §110, which requires that the elements of the SIP be enforceable, include replicable elements, and ensure compliance and accountability. Oil and gas facilities that are subject to the aforementioned programs will be required to comply with these revisions.

TIP commented that new rule language in §116.115, stating that emissions exceeding the maximum allowable emission rates are not authorized and are a violation of the permit, was redundant and, therefore, unnecessary. TIP also stated that this revision was unrelated to NSR reform and its presence in a SIP approved section of the rule opened a potential SIP gap.

The commenter is correct that this change is not directly related to EPA's disapproval notice. However, EPA regularly comments on the lack of similar language in permits. Therefore, this change assists with further ensuring that the permits that are issued, which are based on these rules, are enforceable. Both rules and permits must be enforceable for inclusion in the SIP. Although the commission is adding this text to a SIP-approved rule, which will now be subject to EPA review again, the commission expects that any gap resulting from commission adoption of the rule, until EPA review, will not result in any adverse effects. This is because the commission is confident that permits issued prior to this rule change are also enforceable.

TIP commented that existing TCEQ rules require all facilities that emit a PAL pollutant be included in the PAL permit. TIP also commented that EPA's lack of clarity on whether the Texas rules allow for emission caps that do not include all facilities at a major source lacks basis in the rules.

Although the commission's position is that the current language in §116.182(1) and §116.186 requires the applicant for a PAL to include all facilities that would be subject to the PAL permit to be included and the current practice of the Air Permit Division is to require all facilities that emit the PAL pollutant to be included in the PAL permit, the commission is making further changes to this rule. The EPA in its September 15, 2010, final disapproval notice stated that §116.186 provides for an emission cap that may not account for all the emissions of a pollutant at a major stationary source. Additionally, EPA stated that §116.182(1) requires applicants to submit a list of facilities to be included in the PAL, such that not all facilities at the entire stationary source are specifically required to be included in the PAL. Due to the continuing confusion regarding this issue, the commission is making additional changes to the rule to add the phrase "that emit the PAL pollutant" and to remove the phrase "to be included in the PAL permit."

TIP commented that the inclusion of references to federal definitions for monitoring systems included in §116.186(c)(1) is inconsistent with definitions for monitoring systems found in other commission rules, notably those in Chapters 115 and 117. TIP stated that TCEQ should align all substantive definitions of these terms with existing definitions to avoid inconsistency and confusion among various programs and portions of the Texas rules. TIP also stated that TCEQ should add the proposed definitions to the general provisions of Chapter 101.

The commission has not changed the rule in response to this comment. TIP is correct that the commission referenced federal definitions of "continuous emission monitoring system" and "continuous parameter monitoring system" for use in §116.186(c)(1) and that the definitions in the proposed references are not the same as the definitions of "continuous monitoring", "CEMS", and "PEMS" in other TCEQ rule chapters such as 30 TAC Chapter 115, Control of Air Pollution from Volatile Organic Compounds, or Chapter 117, Control of Air Pollution from Nitrogen Compounds. Chapters 115 and 117 are rules intended to ensure that reasonably available control technology (RACT) is applied to new and existing sources in specific areas in order to help those areas achieve and maintain attainment with the ozone NAAQS. Those chapters also contain requirements that are more stringent than RACT as part of the TCEQ's ozone NAAQS attainment demonstrations. The objectives, control technology requirements, implementation strategy, and underlying rule language is necessarily different when comparing a federal NSR authorization program such as the PAL permits program, to rules such as those in Chapters 115 and 117. The definitions are more appropriate for use with the PAL permit program than are the existing definitions within Chapters 115 and 117. Revising the definitions in Chapters 115 and 117, or establishing new definitions within Chapter 101 is beyond the scope of this rulemaking.

The EPA requested that TCEQ clarify that the references to BACT in §116.192(a) refer to federal BACT as defined in the FCCA.

The commission agrees with the comment and is changing §116.192(a)(1) and (4) to specifically state that the BACT equivalent required by the rule is federal BACT as identified in §116.160(c)(1)(A).

The EPA commented that §116.192(a) should be revised to clearly require all facilities contributing to an increase in emissions resulting in source's emissions equaling or exceeding its PAL are subject to PSD or NNSR.

The commission agrees with the comment and is changing §116.192(a)(2) to state clearly that all facilities contributing to an increase in emissions resulting in source's emissions equaling or exceeding its PAL are subject to major NSR review and specify that the authorization required shall be either a PSD or NNSR permit. This change will help ensure that this section of the rule is approvable into the SIP.

The EPA requested that §116.192(c) reference both 40 CFR §52.21(aa)(11) and §51.165(f)(11) in order to trigger applicability of PSD and NNSR.

The commission agrees with the comment and is changing §116.192(c)(1)(C) to include both references to the federal regulations to ensure the commission rules include adequate references to corresponding federal rules.

TIP commented that the revision to §116.601 does not directly relate to one of the EPA's stated bases for disapproving the rule and opens a new SIP gap.

The commission has made no changes in response to this comment. The adopted change to the rule removes citations to rules that are now obsolete, because EPA has either disapproved the rule (§116.617) or the rules have been not acted upon by EPA and, subsequently, withdrawn from EPA consideration by the commission due to being repealed (§116.620 and §116.621), and replaces those citations with generic language that the commission expects to be non-controversial and, therefore, should

be approvable by EPA. While EPA did not comment in its disapproval (75 *Federal Register* 56423, September 15, 2010) of §116.617 that a reference to the rule elsewhere was an issue, it is clear that such a reference is now inappropriate. Further, although the commission's current practice is to use its authority to adopt standard permits as non-rule standard permits, it wants to retain its option to adopt standard permits as rules in Chapter 116, Subchapter F. Any such standard permit would need to be submitted to EPA as a SIP revision. Therefore, the resulting SIP gap is not of such concern that the commission wants to retain a reference to rules that are not in the SIP or have been repealed.

The EPA supported the discontinuation of the pollution control standard permit by the commission's proposed changes to §116.617, but noted that many facilities may continue to rely on it and that these permits were not part of the federally approved TCEQ NSR SIP. The EPA also acknowledged the TCEQ's development of a non-rule pollution control standard permit. TIP commented that the revision to §116.617 to limit the use of the pollution control standard permit does not address EPA's disapproval of this authorization and the TCEQ should confirm that existing authorizations under this section of the rule are valid.

The TCEQ maintains its position that §116.617 is an efficient and legally supportable authorization for pollution control projects in Texas. The commission's position is that the authorizations that have been issued under §116.617 prior to this change in the rule, and all other prior versions of this standard permit, remain valid permits.

The TCEQ has proposed a new non-rule PCP standard permit and has received comments from EPA regarding that proposal. The executive director will present his response to those comments to the commission for consideration of a new non-rule PCP standard permit.

The EPA commented that, although TCEQ was not submitting §116.617 as a SIP revision, it was submitting comments on §116.617 to assure that Texas' ongoing implementation of any pollution control standard permit was consistent with the basis for disapproval expressed in EPA's final disapproval notice (see September 15, 2010 (75 *Federal Register* 56424)).

On September 23, 2009, the EPA proposed disapproval of §116.617 (74 Federal Register 48467,), as adopted by the commission effective February 1, 2006. The amendments to §116.617 were adopted in 2006 to address prior comments from EPA after the opinion of the District of Columbia Circuit Court of Appeals in *New York v. EPA* (June 24, 2005), which ruled that EPA's rules that exempted pollution control projects from PSD review by defining "modifications" to exclude collateral emission increases associated with those projects did not meet the requirements of the FCAA. Specifically, the amendments adopted in 2006 clarified that any project that constitutes a new major stationary source or major modification as defined in §116.12 is subject to the requirements of Chapter 116, Subchapter B, rather than the requirements of Chapter 116, Subchapter F. The commission appropriately interpreted the *New York* opinion to apply to the PSD permitting program and, therefore, made amendments to §116.617 to continue the program to assist with the efficient authorization method for installation of pollution control equipment for projects that do not trigger federal review.

The EPA acknowledged that §116.617 (as adopted in 2006) explicitly prohibits the use of the PCP Standard Permit for new major sources and major modifications; thus, addressing the court's decision in *New York v. EPA*. The EPA has not adopted any rules that provide detailed requirements for this type of permit, or any rules prohibiting it. In fact, the applicable rule in 40 CFR §51.160 is broadly written and has been interpreted by EPA to provide states discretion to tailor their own minor NSR permit programs. As noted earlier, the commission's standard permit program is part of the approved Texas SIP, and EPA has determined it meets 40 CFR Part 51. The commission is challenging the EPA's disapproval of §116.617.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.12

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The amendment is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et*

seq., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511 - 382.0515, and 382.0518; and FCAA, 42 USC, §§7401 *et seq.*

§116.12. Nonattainment and Prevention of Significant Deterioration Review Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas. In addition to the terms that are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and Chapter 116, Subchapter C, Division 1 of this title (relating to Plant-Wide Applicability Limits), have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) Allowable emissions--The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits that restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards specified in 40 Code of Federal Regulations Part 60 or 61;

(B) the applicable state implementation plan emissions limitation including those with a future compliance date; or

(C) the emissions rate specified as a federally enforceable permit condition including those with a future compliance date.

(3) Baseline actual emissions--The rate of emissions, in tons per year, of a federally regulated new source review pollutant.

(A) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five-year period immediately preceding when the owner or operator begins actual construction of the project. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(B) For an existing facility (other than an electric utility steam generating unit), baseline actual emissions means the average rate, in tons per year, at which the facility actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the ten-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received for a permit. The rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply with the exception of those required under 40 Code of Federal Regulations Part 63, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.

(C) For a new facility, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and for all other purposes during the first two years following initial operation, shall equal the unit's potential to emit.

(D) The actual average rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period. For each regulated new source review pollutant, when a project involves multiple facilities, only one consecutive 24-month period must be used to determine the baseline actual emissions for the facilities being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant. The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount. Baseline emissions cannot occur prior to November 15, 1990.

(E) The actual average emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as resulting from planned maintenance, startup, or shutdown activities; historically unauthorized; and subject to reporting under Chapter 101 of this title (relating to General Air Quality Rules) shall be included to the extent that they have been authorized.

(4) Basic design parameters--For a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British thermal units content shall be used for determining the basic design parameters for a coal-fired electric utility steam generating unit. The basic design parameters for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator shall consider the primary product or primary raw material when selecting a basic design parameter. The owner or operator may propose an alternative basic design parameter for the source's process units to the executive director if the owner or operator believes the basic design parameter as defined in this paragraph is not appropriate for a specific industry or type of process unit. If the executive director approves of the use of an alternative basic design parameter, that basic design parameter shall be identified and compliance required in a condition in a permit that is legally enforceable.

(A) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter.

(B) If design information is not available for a process unit, the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(C) Efficiency of a process unit is not a basic design parameter.

(5) Begin actual construction--In general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities that mark the initiation of the change.

(6) Building, structure, facility, or installation--All of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities are considered to be part of the same industrial grouping if they belong to the same "major group" (i.e., that have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(7) Clean coal technology--Any technology, including technologies applied at the precombustion, combustion, or post-combustion stage, at a new or existing facility that will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam that was not in widespread use as of November 15, 1990.

(8) Clean coal technology demonstration project--A project using funds appropriated under the heading "Department of Energy-Clean Coal Technology," up to a total amount of $2.5 billion for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States Environmental Protection Agency. The federal contribution for a qualifying project shall be at least 20% of the total cost of the demonstration project.

(9) Commence--As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

(11) Contemporaneous period--For major sources the period between:

(A) the date that the increase from the particular change occurs; and

(B) 60 months prior to the date that construction on the particular change commences.

(12) *De minimis* threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment or prevention of significant deterioration review. The summation of the proposed project emission increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the significant level for that pollutant. If the significant level is exceeded, then prevention of significant deterioration and/or nonattainment review is required.

(13) Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(14) Federally regulated new source review pollutant--As defined in subparagraphs (A) - (D) of this paragraph:

(A) any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the United States Environmental Protection Agency;

(B) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111;

(C) any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI; or

(D) any pollutant that otherwise is subject to regulation under the FCAA; except that any or all hazardous air pollutants either listed in FCAA, §112 or added to the list under FCAA, §112(b)(2), which have not been delisted under FCAA, §112(b)(3), are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under FCAA, §108.

(15) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, §7411, and that reflects the following:

(A) the most stringent emission limitation that is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B) the most stringent emission limitation that is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(16) Major facility--Any facility that emits or has the potential to emit 100 tons per year or more of the plant-wide applicability limit (PAL) pollutant in an attainment area; or any facility that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant in Table I of this section for nonattainment areas.

(17) Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions

or more of any air contaminant (including volatile organic compounds (VOCs) for which a national ambient air quality standard has been issued. The major source thresholds are identified in Table I of this section for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations (CFR) §51.166(b)(1). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR §51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR §51.165(a)(1)(iv)(C).

(18) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source. At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations §51.166(b)(1) and (23), respectively.
Figure: 30 TAC §116.12(18)(A)

(B) A physical change or change in the method of operation shall not include:

(i) routine maintenance, repair, and replacement;

(ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, §2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act;

(iii) use of an alternative fuel by reason of an order or rule of 42 United States Code, §7425;

(iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) use of an alternative fuel or raw material by a stationary source that the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to use under any permit issued under regulations approved under this chapter;

(vi) an increase in the hours of operation or in the production rate (unless the change is prohibited under any federally enforceable permit condition that was established after December 21, 1976);

(vii) any change in ownership at a stationary source;

(viii) any change in emissions of a pollutant at a site that occurs under an existing plant-wide applicability limit;

(ix) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated;

(x) for prevention of significant deterioration review only, the installation or operation of a permanent clean coal technology demonstration project that constitutes re-powering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis; or

(xi) for prevention of significant deterioration review only, the reactivation of a clean coal-fired electric utility steam generating unit.

(19) Necessary preconstruction approvals or permits--Those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations that are part of the applicable state implementation plan.

(20) Net emissions increase--The amount by which the sum of the following exceeds zero: the project emissions increase plus any sourcewide creditable contemporaneous emission increases, minus any sourcewide creditable contemporaneous emission decreases. Baseline actual emissions shall be used to determine emissions increases and decreases.

(A) An increase or decrease in emissions is creditable only if the following conditions are met:

(i) it occurs during the contemporaneous period;

(ii) the executive director has not relied on it in issuing a federal new source review permit for the source and that permit is in effect when the increase in emissions from the particular change occurs; and

(iii) in the case of prevention of significant deterioration review only, an increase or decrease in emissions of sulfur dioxide, particulate matter, or nitrogen oxides that occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(B) An increase in emissions is creditable if it is the result of a physical change in, or change in the method of operation of a stationary source only to the extent that the new level of emissions exceeds the baseline actual emission rate. Emission increases at facilities under a plant-wide applicability limit are not creditable.

(C) A decrease in emissions is creditable only to the extent that all of the following conditions are met:

(i) the baseline actual emission rate exceeds the new level of emissions;

(ii) it is federally enforceable at and after the time that actual construction on the particular change begins;

(iii) the executive director has not relied on it in issuing a prevention of significant deterioration or a nonattainment permit;

(iv) the decrease has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(v) in the case of nonattainment applicability analysis only, the state has not relied on the decrease to demonstrate attainment or reasonable further progress.

(D) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(21) Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, §7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order for a reduction to qualify as an offset, it must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and Trading; or Discrete Emission Credit Banking and Trading), except as provided for in §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(22) Plant-wide applicability limit--An emission limitation expressed, in tons per year, for a pollutant at a major stationary source, that is enforceable and established in a plant-wide applicability limit permit under §116.186 of this title (relating to General and Special Conditions).

(23) Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit. The plant-wide applicability limit effective date for a plant-wide applicability limit established in an existing flexible permit is the date that the flexible permit was issued.

(24) Plant-wide applicability limit major modification--Any physical change in, or change in the method of operation of the plant-wide applicability limit source that causes it to emit the plant-wide applicability limit pollutant at a level equal to or greater than the plant-wide applicability limit.

(25) Plant-wide applicability limit permit--The new source review permit that establishes the plant-wide applicability limit.

(26) Plant-wide applicability limit pollutant--The pollutant for which a plant-wide applicability limit is established at a major stationary source.

(27) Potential to emit--The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, may be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions, as defined in 40 Code of Federal Regulations §51.165(a)(1)(viii), do not count in determining the potential to emit for a stationary source.

(28) Project net--The sum of the following: the project emissions increase, minus any sourcewide creditable emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Baseline actual emissions shall be used to determine emissions increases and decreases. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(29) Projected actual emissions--The maximum annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator of the major stationary source shall include unauthorized emissions from planned maintenance, startup, or shutdown activities, which were historically unauthorized and subject to reporting under Chapter 101 of this title, to the extent they have been authorized, or are being authorized; and fugitive emissions to the extent quantifiable; and shall consider all relevant information, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan.

(30) Project emissions increase--The sum of emissions increases for each modified or affected facility determined using the following methods:

(A) for existing facilities, the difference between the projected actual emissions and the baseline actual emissions. In calculating any increase in emissions that results from the project, that portion of the facility's emissions following the project that the facility could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth may be excluded from the project emission increase. The potential to emit from the facility following completion of the project may be used in lieu of the projected actual emission rate; and

(B) for new facilities, the difference between the potential to emit from the facility following completion of the project and the baseline actual emissions.

(31) Replacement facility--A facility that satisfies the following criteria:

(A) the facility is a reconstructed unit within the meaning of 40 Code of Federal Regulations §60.15(b)(1), or the facility replaces an existing facility;

(B) the facility is identical to or functionally equivalent to the replaced facility;

(C) the replacement does not alter the basic design parameters of the process unit;

(D) the replaced facility is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable. If the replaced facility is brought back into operation, it shall constitute a new facility. No creditable emission reductions shall be generated from shutting down the existing facility that is replaced. A replacement facility is considered an existing facility for the purpose of determining federal new source review applicability.

(32) Secondary emissions--Emissions that would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that would not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions that come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(33) Significant facility--A facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an

amount that is equal to or greater than the significant level for that PAL pollutant.

(34) Small facility--A facility that emits or has the potential to emit the plant-wide applicability limit (PAL) pollutant in an amount less than the significant level for that PAL pollutant.

(35) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant subject to regulation under 42 United States Code, §§7401 *et seq.*

(36) Temporary clean coal technology demonstration project--A clean coal technology demonstration project that is operated for a period of five years or less, and that complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100539
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 3, 2011
Proposal publication date: August 27, 2010
For further information, please call: (512) 239-0177

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SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.115, §116.127

STATUTORY AUTHORITY

The amendment and new section are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §7.101, concerning Violation, which prohibits violation of a statute or rule within the commission's jurisdiction; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment and new section are adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The amendment and new section are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The adopted amendment and new section implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511 - 382.0515, and 382.0518; and FCAA, 42 USC, §§7401 *et seq.*

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100540
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 3, 2011
Proposal publication date: August 27, 2010
For further information, please call: (512) 239-0177

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30 TAC §116.121

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which

authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The repeal is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The adopted repeal implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511 - 382.0515, and 382.0518; and FCAA, 42 USC, §§7401 *et seq.*

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100541

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 3, 2011
Proposal publication date: August 27, 2010
For further information, please call: (512) 239-0177

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SUBCHAPTER C. PLANT-WIDE APPLICABILITY LIMITS

DIVISION 1. PLANT-WIDE APPLICABILITY LIMITS

30 TAC §§116.180, 116.182, 116.186, 116.188, 116.190, 116.192

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concern-

ing Application for Permit, which specifies permit application requirements; and THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits. The amendments are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The adopted amendments implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511 - 382.0515, and 382.0518; and FCAA, 42 USC, §§7401 *et seq.*

§116.180. Applicability.

(a) The following requirements apply to a plant-wide applicability limit (PAL) permit.

(1) Only one PAL may be issued for each pollutant at an existing major stationary source.

(2) A PAL permit may include more than one PAL.

(3) A PAL permit may not cover facilities or emissions units at more than one existing major stationary source.

(4) A PAL permit may be consolidated with a new source review permit at the existing major stationary source.

(5) A PAL permit can be issued only for an existing major stationary source; it may not be issued for a new major stationary source as defined in 40 Code of Federal Regulations §51.165(iv)(A).

(b) The new owner of a major stationary source shall comply with §116.110(e) of this title (relating to Applicability), provided that all facilities, or emissions units at a major stationary source, covered by a PAL permit change ownership at the same time and to the same person, or both the new owner and existing permit holder must obtain a PAL permit alteration allocating the emission prior to the transfer of the permit by the commission. After the sale of a facility, or emissions unit at a major stationary source, but prior to the transfer of a permit requiring a permit alteration, the original PAL permit holder remains responsible for ensuring compliance with the existing PAL permit and all rules of the commission.

(c) The owner of the facility, emissions unit at a major stationary source, group of facilities, or account or the operator of the facility, emissions unit at a major stationary source, group of facilities, or account that is authorized to act for the owner is responsible for complying with this section, except as provided by subsection (b) of this section.

§116.182. Plant-wide Applicability Limit Permit Application.

Any application for a new plant-wide applicability limit (PAL) permit or PAL permit amendment must be completed and signed by an authorized representative. In order to be granted a PAL permit or PAL permit amendment, the owner or operator of the proposed facility shall submit information to the commission that demonstrates that all of the following information is submitted:

(1) a list of all facilities, or emissions units at a major stationary source, that emit the PAL pollutant, including their registration or permit number, their potential to emit, and the expected maximum capacity. In addition, the owner or operator of the source shall indicate which, if any, federal or state applicable requirements, emission limitations, or work practices apply to each unit;

(2) calculations of the baseline actual emissions with supporting documentation;

(3) the calculation procedures that the permit holder proposes to use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month; and

(4) the monitoring and recordkeeping proposed satisfy the requirements of §116.186 of this title (relating to General and Special Conditions) for each PAL.

§116.186. General and Special Conditions.

(a) The plant-wide applicability limit (PAL) will impose an annual emission limitation in tons per year, that is enforceable for all facilities, or emissions units at a major stationary source, that emit the PAL pollutant. For each month during the PAL effective period after the first 12 months of establishing a PAL, the major stationary source owner or operator shall demonstrate that the sum of the monthly emissions from each facility under the PAL for the previous 12 consecutive months is less than the PAL (a 12-month average, rolled monthly). For each month during the first 11 months from the PAL effective date, the major stationary source owner or operator shall demonstrate that the sum of the preceding monthly emissions from the PAL effective date for each facility under the PAL is less than the PAL. Each PAL must include emissions of only one pollutant. The PAL must include all emissions, including fugitive emissions, to the extent quantifiable, from all facilities or emissions units at a major stationary source included in the PAL that emit or have the potential to emit the PAL pollutant.

(b) The following general conditions are applicable to every PAL permit.

(1) Applicability. This section does not authorize any facility to emit air pollutants but establishes an annual emissions level below which new and modified facilities, or emissions units at a major stationary source, will not be subject to major new source review for that pollutant.

(2) Sampling requirements. If sampling of stacks or process vents is required, the PAL permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures. All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission. The PAL permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(3) Equivalency of methods. The permit holder shall demonstrate the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the PAL permit. Alternative methods must be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(4) Recordkeeping and reporting.

(A) A copy of the PAL permit along with information and data sufficient to demonstrate continuous compliance with the emission caps contained in the PAL permit must be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information must be maintained at the nearest staffed location within Texas specified by the permit holder in the permit application. This information must include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operating hours. Additional

recordkeeping requirements may be specified in special conditions attached to the PAL permit.

(B) The owner or operator shall retain a copy of the PAL permit application and any applications for revisions to the PAL, each annual certification of compliance under §122.146 of this title (relating to Compliance Certification Terms and Conditions), and the data relied on in certifying the compliance for the duration of the PAL plus five years.

(C) A semiannual report shall be submitted to the executive director within 30 days of the end of each reporting period that contains:

(i) the identification of owner and operator and the permit number;

(ii) total annual emissions (in tons per year) based on a 12-month rolling total for each month in the reporting period;

(iii) all data relied upon, including, but not limited to, any quality assurance or quality control data, in calculating the monthly and annual PAL pollutant emissions;

(iv) a list of any facility modified or added to the major stationary source during the preceding six-month period;

(v) the number, duration, and cause of any deviations or monitoring malfunctions (other than the time associated with zero and span calibration checks), and any corrective action taken. This may be satisfied by referencing the PAL permit number in the semiannual report for the site submitted under §122.145 of this title (relating to Reporting Terms and Conditions);

(vi) a notification of a shutdown of any monitoring system, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, and whether the emissions unit monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the number determined by method included in the permit; and

(vii) a signed statement by the responsible official, as defined in §122.10 of this title (relating to General Definitions), certifying the truth, accuracy, and completeness of the information provided in the report.

(D) The owner or operator shall submit the results of any revalidation test or method to the executive director within three months after completion of such test or method.

(5) Maintenance of emission control. The facilities covered by the PAL permit will not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations.

(6) Compliance with rules. Acceptance of a PAL permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all rules and orders of the commission issued in conformity with the Texas Clean Air Act and the conditions precedent to the granting of the permit. If more than one state or federal rule or PAL permit condition is applicable, the most stringent limit or condition will govern and be the standard by which compliance must be demonstrated. Acceptance includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the PAL permit.

(7) Effective period. A PAL is effective for ten years.

(8) Absence of monitoring data. A source owner or operator shall record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for a facility during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the PAL permit special conditions.

(9) Monitoring system requirements. Failure to use a monitoring system that meets the requirements of this section is a violation of the PAL permit.

(10) Revalidation. All data used to establish the PAL pollutant must be revalidated through performance testing or other scientifically valid means approved by the executive director. Such testing must occur at least once every five years after issuance of the PAL.

(11) Renewal. If a PAL renewal application is submitted to the executive director in accordance with §116.196 of this title (relating to Renewal of a Plant-wide Applicability Limit Permit), the PAL shall not expire at the end of the PAL effective period. It shall remain in effect until a renewed PAL permit is issued by the executive director or the application is voided.

(c) Each PAL permit must include special conditions that satisfy the following requirements.

(1) For the purposes of this subchapter, the definitions of the following terms are the same as those provided in 40 Code of Federal Regulations §51.165.

(A) Continuous emission monitoring system (CEMS).

(B) Continuous emissions rate monitoring system (CERMS).

(C) Continuous parameter monitoring system (CPMS).

(D) Predictive emissions monitoring system (PEMS).

(2) The PAL monitoring system must accurately determine all emissions of the PAL pollutant in terms of mass per unit of time. Any monitoring system authorized for use in the PAL permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation.

(3) The PAL monitoring system must employ one or more of the general monitoring approaches meeting the minimum requirements as described in subparagraphs (A) - (D) of this paragraph.

(A) An owner or operator using mass balance calculations to monitor PAL pollutant emissions from activities using coating or solvents shall meet the following requirements:

(i) provide a demonstrated means of validating the published content of the PAL pollutant that is contained in, or created by, all materials used in or at the facility;

(ii) assume that the facility emits all of the PAL pollutant that is contained in, or created by, any raw material or fuel used in or at the facility, if it cannot otherwise be accounted for in the process; and

(iii) where the vendor of a material or fuel that is used in or at the facility publishes a range of pollutant content from such material, the owner or operator shall use the highest value of the range to calculate the PAL pollutant emissions unless the executive director determines that there is site-specific data or a site-specific monitoring program to support another content within the range.

(B) An owner or operator using a CEMS to monitor PAL pollutant emissions shall meet the following requirements.

(i) The CEMS must comply with applicable performance specifications found in 40 Code of Federal Regulations Part 60, Appendix B.

(ii) The CEMS must sample, analyze, and record data at least every 15 minutes while the emissions unit is operating.

(C) An owner or operator using CPMS or PEMS to monitor PAL pollutant emissions shall meet the following requirements.

(i) The CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the PAL pollutant emissions across the range of operation of the facility.

(ii) Each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes or at another less frequent interval approved by the executive director, while the facility is operating.

(D) An owner or operator using emission factors to monitor PAL pollutant emissions shall meet the following requirements.

(i) All emission factors must be adjusted, if appropriate, to account for the degree of uncertainty or limitations in the factors' development.

(ii) The facility must operate within the designated range of use for the emission factor, if applicable.

(iii) If technically practicable, the owner or operator of a significant facility that relies on an emission factor to calculate PAL pollutant emissions shall conduct validation testing to determine a site-specific emission factor within six months of PAL permit issuance, unless the executive director determines that testing is not required.

(E) An alternative monitoring approach must meet the requirements in paragraph (1) of this subsection and be approved by the executive director.

(4) Where an owner or operator of a facility cannot demonstrate a correlation between a monitored parameter(s) and the PAL pollutant emissions rate at all operating points of the facility, the executive director shall:

(A) establish default value(s) for determining compliance with the PAL based on the highest potential emissions reasonably estimated at such operating point(s); or

(B) determine that operation of the facility during operating conditions when there is no correlation between monitored parameter(s) and the PAL pollutant emissions is a violation of the PAL.

§116.190. Federal Nonattainment and Prevention of Significant Deterioration Review.

(a) An increase in emissions from operational or physical changes at a facility, or emissions unit at a major stationary source, covered by a plant-wide applicability limit (PAL) permit is insignificant, for the purposes of major new source review under this subchapter, if the increase does not exceed the PAL.

(b) At no time are emissions reductions of a PAL pollutant that occur during the PAL effective period creditable as decreases for purposes of offsets, unless the level of the PAL is reduced by the amount of such emissions reductions and such reductions would be creditable in the absence of the PAL.

(c) A physical or operational change not causing an exceedance of a PAL is not subject to federal restrictions on relaxing enforceable emission limitations to avoid new source review.

§116.192. Amendments and Alterations.

(a) Any increase in a plant-wide applicability limit (PAL) must be made through amendment. Amendment applications must also include the information identified in §116.182 of this title (relating to Plant-wide Applicability Limit Permit Application) for new and modified facilities contributing to the increase in emissions so as to cause the major stationary source's emissions to equal or exceed its PAL and are subject to the public notice requirements under §116.194 of this title (relating to Public Notice and Comment).

(1) As part of this application, the major stationary source owner or operator shall demonstrate that the sum of the baseline actual emissions of the small facilities, plus the sum of the baseline actual emissions of the significant and major facilities assuming application of federal best available control technology (BACT) (as identified in §116.160(c)(1)(A) of this title (relating to Prevention of Significant Deterioration Requirements)) equivalent controls, plus the sum of the allowable emissions of the new or modified facilities exceeds the PAL. The level of control that would result from federal BACT equivalent controls on each significant or major facility shall be determined by conducting a new federal BACT analysis at the time the application is submitted, unless the facility is currently required to comply with a federal BACT or lowest achievable emission rate (LAER) requirement that was established within the preceding ten years. In such a case, the assumed control level for that emissions unit shall be equal to the level of federal BACT or LAER with which that emissions unit must currently comply.

(2) The owner or operator shall obtain a major new source review permit under applicable provision of Subchapter B, Division 5 and Division 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively) for all facilities contributing to the increase in emissions so as to cause the major stationary source's emissions to equal or exceed its PAL, regardless of the magnitude of the emissions increase. These facilities shall comply with any emissions requirements resulting from the major new source review process.

(3) The PAL permit shall require that the increased PAL level be effective on the day any emission unit that is part of the PAL major modification becomes operational and begins to emit the PAL pollutant.

(4) The new PAL shall be the sum of the allowable emissions for each modified or new facility, plus the sum of the baseline actual emissions of the significant and major emissions units after the application of federal BACT equivalent controls as identified in paragraph (1) of this subsection, plus the sum of the baseline actual emissions of the small emissions units.

(b) Changes to PAL permits that do not require the PAL to be increased must be completed through permit alteration. Unless allowed in the PAL permit special conditions, the permit holder shall submit an alteration request prior to start of construction for physical modifications to facilities or installation of new facilities under the PAL. Approval must be received from the executive director prior to start of operation of the facilities if the emissions from the new or modified facilities may exceed 100 tons per year.

(c) Acceptance of a PAL permit is agreement by the permit holder for the executive director to reopen the PAL permit consistent with the requirements of §116.194 of this title for any actions in paragraphs (1) or (2) of this subsection.

(1) During the PAL effective period, the executive director shall reopen the PAL permit to:

(A) correct typographical or calculation errors made in setting the PAL or reflect a more accurate determination of emissions used to establish the PAL;

(B) decrease the PAL limit the owner or operator of the major stationary source creates creditable emissions reductions that meet the requirements of 40 Code of Federal Regulations (CFR) §51.165(a)(3)(ii) for use as offsets; and

(C) revise the PAL to reflect an increase in the PAL provided the owner or operator complies with the requirements of 40 CFR §52.21(aa)(11) and §51.165(f)(11).

(2) During the PAL effective period, the executive director may reopen the PAL permit for the following:

(A) revise the PAL to reflect newly applicable federal requirements (for example, New Source Performance Standards) with compliance dates after the PAL effective date;

(B) revise the PAL to be consistent with any other requirement, that is enforceable as a practical matter, and that the State may impose on the major stationary source under the state Implementation Plan; or

(C) reduce the PAL if the reviewing authority determines that a reduction is necessary to avoid causing or contributing to a National Ambient Air Quality Standard or Prevention of Significant Deterioration increment violation, or to an adverse impact on an air quality related value that has been identified for a Federal Class I area by a federal land manager and for which information is available to the general public.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100542
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Effective date: March 3, 2011
Proposal publication date: August 27, 2010
For further information, please call: (512) 239-0177

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SUBCHAPTER F. STANDARD PERMITS

30 TAC §116.601, §116.617

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures to be used in determining violations of and compliance with the commission's rules; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0511, concerning Permit Consolidation and Amendment, which authorizes the commission to consolidate various authorizations; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0514, concerning Sampling, Monitoring, and Certification, which authorizes the commission to require sampling and monitoring of a permitted federal source or facility; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05195, concerning Standard Permit, which authorizes the commission to issue a standard permit for new or existing similar facilities. The amendments are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, 382.040, 382.051, 382.0511 - 382.0515, 382.0518, and 382.05195; and FCAA, 42 USC, §§7401 *et seq.*

§116.617. State Pollution Control Project Standard Permit.

(a) Scope and applicability.

(1) This standard permit applies to pollution control projects undertaken voluntarily or as required by any governmental standard, that reduce or maintain currently authorized emission rates for facilities authorized by a permit, standard permit, or permit by rule.

(2) The project may include:

(A) the installation or replacement of emissions control equipment;

(B) the implementation or change to control techniques; or

(C) the substitution of compounds used in manufacturing processes.

(3) This standard permit must not be used to authorize the installation of emission control equipment or the implementation of a control technique that:

(A) constitutes the complete replacement of an existing production facility or reconstruction of a production facility as defined in 40 Code of Federal Regulations §60.15(b)(1) and (c); or

(B) the executive director determines there are health effects concerns or the potential to exceed a national ambient air quality standard criteria pollutant or contaminant that results from an increase in emissions of any air contaminant until those concerns are addressed by the registrant to the satisfaction of the executive director; or

(C) returns a facility or group of facilities to compliance with an existing authorization or permit unless authorized by the executive director.

(4) Prior to March 3, 2011, new or modified pollution control projects must meet the conditions of this standard permit. All previous standard permit registrations under this section that were authorized prior to the effective date of this rule must include the increases and decreases in emissions resulting from those projects in any future netting calculation and all other conditions must be met upon the ten-year anniversary and renewal of the original registration, or until administratively incorporated into the facilities' permit, if applicable.

(5) Notwithstanding the requirements of §116.604 of this title (relating to Duration and Renewal of Registrations to Use Standard Permits), on or after March 3, 2011, no new or modified registrations will be accepted and no existing registrations will be renewed.

(b) General requirements.

(1) Any claim under this standard permit must comply with all applicable conditions of:

(A) §116.604(1) and (2) of this title (relating to Duration and Renewal of Registrations to Use Standard Permits);

(B) §116.605(d)(1) and (2) of this title (relating to Standard Permit Amendment and Revocation);

(C) §116.610 of this title (relating to Applicability);

(D) §116.611 of this title (relating to Registration to Use a Standard Permit);

(E) §116.614 of this title (relating to Standard Permit Fees); and

(F) §116.615 of this title (relating to General Conditions).

(2) Construction or implementation of the pollution control project must begin within 18 months of receiving written acceptance of the registration from the executive director, with one 18-month extension available, and must comply with §116.115(b)(2) and §116.120 of this title (relating to General and Special Conditions and Voiding of Permits). Any changes to allowable emission rates authorized by this section become effective when the project is complete and operation or implementation begins.

(3) The emissions limitations of §116.610(a)(1) of this title do not apply to this standard permit.

(4) Predictable maintenance, startup, and shutdown emissions directly associated with the pollution control projects must be included in the representations of the registration application.

(5) Any increases in actual or allowable emission rates or any increase in production capacity authorized by this section (including increases associated with recovering lost production capacity) must occur solely as a result of the project as represented in the registration application. Any increases of production associated with a pollution control project must not be utilized until an additional authorization is obtained. This paragraph is not intended to limit the owner or operator's ability to recover lost capacity caused by a derate, which may be recovered and used without any additional authorization.

(c) Replacement projects.

(1) The replacement of emissions control equipment or control technique under this standard permit is not limited to the method of control currently in place, provided that the control or technique is at least as effective as the current authorized method and all other requirements of this standard permit are met.

(2) The maintenance, startup, and shutdown emissions may be increased above currently authorized levels if the increase is necessary to implement the replacement project and maintenance, startup, and shutdown emissions were authorized for the existing control equipment or technique.

(3) Equipment installed under this section is subject to all applicable testing and recordkeeping requirements of the original control authorization. Alternate, equivalent monitoring, or records may be proposed by the applicant for review and approval of the executive director.

(d) Registration requirements.

(1) A registration must be submitted in accordance with the following.

(A) If there are no increases in authorized emissions of any air contaminant resulting from a replacement pollution control project, a registration must be submitted no later than 30 days after construction or implementation begins and the registration must be accompanied by a $900 fee.

(B) If a new control device or technique is authorized or if there are increases in authorized emissions of any air contaminant resulting from the pollution control project, a registration must be submitted no later than 30 days prior to construction or implementation. The registration must be accompanied by a $900 fee. Construction or implementation may begin only after:

(i) no written response has been received from the executive director within 30 calendar days of receipt by the Texas Commission on Environmental Quality (TCEQ); or

(ii) written acceptance of the pollution control project has been issued by the executive director.

(C) If there are any changes in representations to a previously authorized pollution control project standard permit for which there are no increases in authorized emissions of any air contaminant, a notification or letter must be submitted no later than 30 days after construction or implementation of the change begins. No fee applies and no response will be sent from the executive director.

(D) If there are any changes in representations to a previously authorized pollution control project standard permit that also increase authorized emissions of any air contaminant resulting from the pollution control project, a registration alteration must be submitted no later than 30 days prior to the start of construction or implementation of the change. The registration must be accompanied by a $450 fee, unless received within 180 days of the original registration approval. Construction or implementation may begin only after:

(i) no written response has been received from the executive director within 30 calendar days of receipt by the TCEQ; or

(ii) written acceptance of the pollution control project has been issued by the executive director.

(2) The registration must include the following:

(A) a description of process units affected by the project;

(B) a description of the project;

(C) identification of existing permits or registrations affected by the project;

(D) quantification and basis of increases and/or decreases associated with the project, including identification of affected existing or proposed emission points, all air contaminants, and hourly and annual emissions rates;

(E) a description of proposed monitoring and recordkeeping that will demonstrate that the project decreases or maintains emission rates as represented; and

(F) a description of how the standard permit will be administratively incorporated into the existing permit(s).

(e) Operational requirements. Upon installation of the pollution control project, the owner or operator shall comply with the requirements of paragraphs (1) and (2) of this subsection.

(1) General duty. The owner or operator must operate the pollution control project in a manner consistent with good industry and engineering practices and in such a way as to minimize emissions of collateral pollutants, within the physical configuration and operational standards usually associated with the emissions control device, strategy, or technique.

(2) Recordkeeping. The owner or operator must maintain copies on site of monitoring or other emission records to prove that the pollution control project is operated consistent with the requirements in paragraph (1) of this subsection, and the conditions of this standard permit.

(f) Incorporation of the standard permit into the facility authorization.

(1) Any new facilities or changes in method of control or technique authorized by this standard permit instead of a permit amendment under §116.110 of this title (relating to Applicability) at a previously permitted or standard permitted facility must be incorporated into that facility's permit when the permit is amended or renewed.

(2) All increases in previously authorized emissions, new facilities, or changes in method of control or technique authorized by this standard permit for facilities previously authorized by a permit by rule must comply with §106.4 of this title (relating to Requirements for Permitting by Rule), except §106.4(a)(1) of this title, and §106.8 of this title (relating to Recordkeeping).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100543

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Effective date: March 3, 2011
Proposal publication date: August 27, 2010
For further information, please call: (512) 239-0177

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (commission or TCEQ) is adopting the amendments to §116.12 and §116.150.

Sections 116.12 and 116.150 are adopted *with changes* to the proposed text as published in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7687) and will be republished.

The adopted amendments to §116.12 and §116.150 will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

On July 18, 1997, the EPA revised the ozone National Ambient Air Quality Standard (NAAQS), promulgating an ozone standard of 0.08 parts per million (ppm) measured over an eight-hour period (the eight-hour ozone NAAQS or standard) (62 *Federal Register* 38856, July 18, 1997). Different groups and states challenged the final eight-hour ozone NAAQS, and ultimately, the United States Supreme Court upheld the EPA's action setting the NAAQS, but found that the EPA had incorrectly implemented the eight-hour ozone NAAQS by classifying areas only under Part D, Subpart 1 of the Federal Clean Air Act (FCAA) Amendments of 1990 and remanding other issues to the District of Columbia (D.C.) Circuit Court of Appeals *(Whitman v. American Trucking Assoc., 121 S.Ct. 903 (2001)).* On March 26, 2002, the D.C. Circuit Court of Appeals rejected the other challenges to the eight-hour ozone NAAQS *(American Trucking Assoc. v. EPA, 283 F.3d 355 (D.C. Cir. 2002)).* The EPA then proposed and adopted implementation rules to implement the eight-hour ozone NAAQS, addressing transition issues from the one-hour ozone NAAQS, the revocation of the one-hour ozone NAAQS, classification of areas for the eight-hour ozone NAAQS, and the specification of requirements relating to SIPs. EPA finalized designations for the 1997 eight-hour ozone NAAQS effective on June 15, 2004.

FCAA, §107 requires the EPA to designate areas nonattainment, attainment, or unclassifiable no later than one year after the EPA promulgates a new or revised NAAQS. For the ozone NAAQS, FCAA, §181 further requires that each area designated nonattainment shall be classified at the time of its designation, by operation of law, in accordance with Table 1 of that section. FCAA, §181, Table 1 prescribes the area class (ranging from marginal to extreme), the design value range (measured in ppm and in measurements relating to the one-hour ozone standard), and the primary standard attainment date (ranging from three years to 20 years after November 15, 1990, the effective date of the 1990 Amendments to the FCAA). Other specifics and exceptions are also provided in FCAA, §181. The classification scheme implemented by the United States Congress provided that areas with design values closer to attaining the one-hour ozone standard

would have less time to attain the standard, and additional requirements of FCAA, Part D, Subpart 2 impose specific, more stringent requirements on areas as the classifications increase from marginal to moderate (and the corresponding design values are further from attainment of the one-hour ozone standard).

The EPA rules implementing the 1997 eight-hour ozone standard were adopted in two phases: the Phase I Rule, 69 *Federal Register* 23951, April 30, 2004, addressed a number of implementation issues for the 1997 eight-hour ozone NAAQS, including how areas should be classified for the 1997 eight-hour ozone NAAQS (since the classification requirements of FCAA, §181 were based on the one-hour ozone standard, the EPA needed to propose and finalize a classification scheme appropriate for the eight-hour ozone standard in accord with FCAA, §181), and which one-hour ozone standard requirements should continue to apply under the 1997 eight-hour ozone NAAQS; and the Phase II Rule (70 *Federal Register* 71612, November 29, 2005), which addressed additional requirements.

In EPA's Phase I Rule, one of the issues that the EPA considered was the continued applicability of control requirements that applied in areas previously designated nonattainment for the one-hour ozone standard. As part of the Phase I Rule, the EPA considered several provisions of the FCAA that it stated were evidence of Congress' intent that certain obligations continue to apply when the EPA revises a NAAQS. The EPA stated that the FCCA, §175A(d) provided that areas could not remove controls that were mandated by the FCAA, Part D, Subpart 2 even after the area attained the NAAQS and was redesignated to attainment. At most, a state could move FCAA, Part D, Subpart 2 controls to the contingency plan provisions of the SIP. Another provision that the EPA reviewed and discussed in the Phase I Rule was FCAA, §172(e), which provides that if the EPA revises a NAAQS to make it be less stringent, then the EPA must promulgate regulations applicable to areas that have not attained the original NAAQS to require controls that are no less stringent than controls that applied to areas designated nonattainment prior to such relaxation. The EPA concluded in the Phase I Rule that "if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent" ((see 69 *Federal Register* 23972), April 30, 2004).

Based on this premise, the EPA adopted rules that provided for certain requirements to continue to apply to areas that were designated nonattainment for the one-hour ozone standard, depending on how they were designated for the eight-hour ozone NAAQS. Areas that were designated nonattainment for both the one-hour ozone and eight-hour ozone NAAQS were required to continue to apply certain requirements that applied under the one-hour ozone standard, with specific exceptions (40 Code of Federal Regulations (CFR) §51.905(a)(1)). These requirements included reasonably available control technology (RACT), inspection and maintenance programs (I/M), major source applicability cut-offs for purposes of RACT, rate of progress reductions (ROP), stage II vapor recovery, clean fuels fleet programs, clean fuel programs for boilers, transportation control measures, enhanced ambient monitoring requirements, required transportation controls, vehicle miles traveled requirements, and nitrogen oxides requirements (40 CFR §51.900(f)). The EPA also provided that nonattainment area New Source Review (NSR) requirements required by FCAA, §§172(c)(5), 173, and 182 based on the area's previous one-hour ozone NAAQS classification were no longer required elements of an approvable SIP (40 CFR §51.905(e)(4)). The EPA also provided that areas would no longer have to meet requirements for conformity, the development of maintenance plans, or the penalty fee obligation for severe areas (40 CFR §51.905).

The EPA's Phase I Rule provided that areas that were nonattainment for the one-hour ozone NAAQS were not required to continue to use the more stringent major source thresholds and emission offset requirements of the one-hour ozone standard when implementing NSR and Title V permitting for the 1997 eight-hour ozone standard.

All areas in Texas designated nonattainment for the 1997 eight-hour ozone NAAQS that were also designated nonattainment for the one-hour ozone NAAQS were classified at a "less stringent" level. Beaumont-Port Arthur (BPA) was classified as "serious" for the one-hour ozone NAAQS, but was classified as "moderate" for the 1997 eight-hour ozone NAAQS. Houston-Galveston-Brazoria (HGB) was classified as "severe" for the one-hour ozone NAAQS and originally classified as "moderate" for the 1997 eight-hour ozone NAAQS. The EPA has since reclassified the HGB area to "severe" for the 1997 eight-hour ozone NAAQS, pursuant to a voluntary reclassification request by the Governor of Texas. The Dallas-Fort Worth (DFW) area was classified as "serious" for the one-hour ozone NAAQS, and was classified as "moderate" for the 1997 eight-hour ozone NAAQS. The El Paso area was nonattainment for the one-hour ozone NAAQS, classified as "serious," but designated attainment for the 1997 eight-hour ozone NAAQS.

So, for example, a regulated entity in the HGB area triggered nonattainment review if the potential to emit was equal to or greater than 25 tons per year (tpy) under the "severe" classification for the one-hour ozone NAAQS, but only triggered nonattainment review under the "moderate" classification for the eight-hour ozone NAAQS if the potential to emit was equal to or greater than 100 tpy. Under the existing rules, since the HGB area has been reclassified to "severe" for the 1997 eight-hour ozone NAAQS, regulated entities must again utilize the same major source threshold and emission offset requirements that previously applied under the one-hour ozone standard.

After designations for the 1997 eight-hour ozone standard and the final Phase I Rule were effective, the commission proceeded with rulemaking to implement the requirements for the 1997 eight-hour ozone standard. The commission updated Chapter 116 to implement the changes from the Phase I Rule regarding the application of the 1997 eight-hour ozone standard for nonattainment NSR. On May 25, 2005, the commission adopted changes to Chapter 116, effective June 16, 2005, to provide that for the HGB, DFW, and BPA eight-hour ozone nonattainment areas, if the EPA promulgated rules requiring NSR permit applications in those areas to be evaluated for nonattainment NSR according to that area's one-hour ozone classification, then each application would be evaluated in accordance with the area's one-hour ozone classification. "Evaluation" was specified as including both the threshold for determining if there was a modification as well as the ratio of offsets required, along with any other applicable requirement that depended upon an area's nonattainment classification. In adopting this rule, the commission noted that although the Phase I Rule provided for the application of the eight-hour ozone standard for nonattainment NSR, the EPA had granted a partial reconsideration of the Phase I Rule specifically regarding that issue, and the result of the reconsideration could be a return to the one-hour ozone standard for application of nonattainment NSR. Because of this concern, the commission adopted contingency language in

§116.150, and in the table footnotes in the figure located in the definition of major modification in §116.12. This contingency language was adopted to be effective in the event that the EPA completed rulemaking to require states to return to a one-hour ozone standard trigger for federal nonattainment NSR evaluations. In this rulemaking, the commission is removing this previously adopted contingency language.

The EPA Phase I Rule, and particularly the EPA's determination that areas designated as nonattainment under the one-hour ozone standard would no longer be subject to one-hour nonattainment NSR requirements, was successfully challenged in *South Coast Air Quality Management District v. Environmental Protection Agency,* 472 F.3d 882 (D.C. Cir. 2006) and the rule was partially vacated and remanded to the EPA, as made clear in its revised opinion on June 8, 2007 *(South Coast Air Quality Management District v. Environmental Protection Agency, 489 F.3d 1245 (D.C. Cir. 2007)).* The *South Coast* decision was upheld by the United States Supreme Court on January 14, 2008.

In a guidance memo issued on October 3, 2007, the EPA stated that it interpreted the *South Coast* ruling as restoring NSR applicability thresholds and emission offset requirements pursuant to classifications under the one-hour ozone standard. The EPA also noted in this guidance memo that it intended to conduct rulemaking to conform the NSR regulations to the *South Coast* decision. EPA stated that it intended to issue an immediately-effective final rule under the authority of the "Good Cause" provision of the Federal Administrative Procedure Act to restore the NSR applicability thresholds and emission offsets associated with designated one-hour ozone nonattainment areas, and would begin a separate notice and comment rulemaking to address longer-term applicability of one-hour ozone NSR requirements, in particular, the conditions and mechanisms under which those one-hour ozone NSR requirements would cease to apply for NSR purposes. Lastly, the EPA strongly encouraged states to comply with the *South Coast* decision as quickly as possible.

Because the one-hour ozone standard has been revoked, the EPA is no longer making redesignations or reclassifications under this standard. However, the EPA is making determinations under its Clean Data Policy that areas are currently attaining the one-hour ozone NAAQS. In its proposal to determine that the Southern New Jersey portion of the Philadelphia Metro nonattainment area attained the one-hour ozone NAAQS (see 73 *Federal Register* 42727, July 23, 2008), the EPA discussed the effect of the D.C. Circuit Court of Appeals' decision vacating a portion of the 1997 eight-hour ozone Phase I Implementation Rule *(South Coast Air Quality Management District v. EPA,* 472 F3d 882 (2006) and 489 F3d 1295 (2007)). The EPA stated: "With respect to the challenges to the anti-backsliding provisions of the rule, the Court vacated three provisions that would have allowed States to remove from the SIP or to not adopt three one-hour obligations once the one-hour ozone NAAQS was revoked (including one-hour nonattainment NSR requirements). {T}he three provisions noted previously . . . were vacated by the Court. As a result, States must continue to meet the obligations for one-hour NSR . . . Currently, EPA is developing two proposed rules to address the Court's vacatur and remand with respect to these three requirements. EPA will address in this proposed rule how the one-hour obligations that currently continue to apply under EPA's anti-backsliding rule (as interpreted by the Court) apply where the EPA has made a determination that the area attained the one-hour ozone NAAQS by its attainment date." One possible outcome from the EPA rulemaking on this issue may be to direct states that want to remove one-hour ozone nonattainment NSR requirements to submit SIP revisions demonstrating that removing one-hour ozone nonattainment NSR requirements will not interfere with attainment or maintenance of the ozone NAAQS.

Because the EPA has not completed any rulemaking to implement the *South Coast* decision regarding NSR anti-backsliding, states must decide how to implement, and give effect to, the court's decision. Any revision to a SIP that could interfere with or does not comply with the FCAA and the SIP because it has the effect of making the approved SIP less stringent may be considered as "backsliding" from those requirements and would not be approvable by the EPA. Given the uncertainty of the future EPA rulemaking, and the finality of the *South Coast* decision as of January 14, 2008, the commission is removing the previously adopted contingency language, in addition to other changes, to clarify the requirements for nonattainment NSR. Without effective and understandable guidance from the EPA, through rulemaking or otherwise, the commission is left to determine the most reasonable course of action. The *South Coast* decision, upheld by the United States Supreme Court, makes clear that areas may not ignore one-hour ozone nonattainment NSR requirements.

The commission had previously adopted rules specifying that sources in the BPA, HGB, and DFW nonattainment areas should apply eight-hour ozone nonattainment NSR requirements. The commission is now deleting certain portions of the definition in §116.12(18)(A), concerning major modification and the requirements of §116.150(d). This rulemaking makes clear that permitted facilities in areas that were designated nonattainment for the one-hour ozone standard are subject to the major source thresholds and emission offsets of the one-hour ozone standard upon the effective date of this rulemaking unless one of the four exceptions identified in §116.150(a) apply.

Staff has previously presented these rule amendments (Rule Project 2008-030-116-PR) to the commission for consideration. At the February 25, 2009, commissioner's agenda, the commission remanded the rule project to the executive director's staff in anticipation of additional direction or action by the EPA, because EPA continued to indicate in various federal notices its intent to complete rulemaking regarding NSR anti-backsliding requirements in response to the *South Coast* decision. EPA's proposed rule to implement the 1997 eight-hour ozone NAAQS revision on subpart 1 reclassification and anti-backsliding provisions under the former one-hour ozone standard was published in the January 16, 2009, *Federal Register,* but has not yet been finalized. This rulemaking removes language regarding the exemptions from nonattainment new source review (NNSR) that were vacated by *South Coast.*

On September 23, 2009, the EPA published notice of the proposed disapproval of past revisions to the Texas NNSR SIP (74 *Federal Register* 48467, September 23, 2009) that are related to these amendments, and finalized this disapproval on September 15, 2010 (74 *Federal Register* 56424). EPA disapproved the changes the commission made to several sections of Chapter 116. Two of these changes were the changes that the commission adopted to §116.12 and §116.150 to implement the Phase I rule implementing the 1997 eight-hour ozone standard, discussed earlier in this preamble, which the commission proposed to change as part of this action. As discussed further in the Section by Section Discussion section of this preamble, the commission is adopting changes to these sections to remove the

disapproved language and to assure that NNSR permitting requirements are clear.

Additionally, on October 20, 2010, EPA published a final rule to approve the redesignation of the BPA 1997 eight-hour ozone nonattainment area to attainment, and clarify EPA's previous approval of the El Paso Section 110(a)(1) maintenance plan for the 1997 eight-hour ozone standard (75 *Federal Register* 64675, October 20, 2010). This final rule noted EPA's new position regarding NSR anti-backsliding and whether one-hour ozone major source thresholds and emission offset requirements continue to apply in an area. EPA noted "after final redesignation to attainment for the 1997 eight-hour ozone standard, EPA does not require the continued application of one-hour anti-backsliding nonattainment NSR, if Texas interprets its SIP as applying PSD to BPA in these circumstances (see 75 *Federal Register* 64675 and 64677, October 20, 2010). The EPA also clarified that, with respect to El Paso, "EPA has had further opportunity to consider the applicable statutory and regulatory provisions and the decision in *South Coast. . .* As a result, we no longer believe that the Clean Air Act requires a separate Section 110(l) analysis to replace one-hour nonattainment NSR with prevention of significant deterioration (PSD) once an area has been redesignated to attainment for the 1997 eight-hour ozone standard, or has an approved Section 110(a)(1) maintenance plan for that standard. In sum, we believe that the approach to the nonattainment NSR/PSD transition that we are adopting here with respect to BPA should also be extended to El Paso. Thus, as long as the Texas NSR SIP is clear that the PSD SIP requirements apply to an area such as El Paso, then that is all that is required by EPA" (see 75 *Federal Register* 64675 and 64677, October 20, 2010). The commission appreciates this clear statement from EPA, and agrees that the SIP should be clear on this issue. Therefore, as discussed in this preamble, although the Texas SIP has always applied PSD in an area upon redesignation, the commission is concurrently adopting changes to Chapter 116 to make clear that PSD applies once an area has been redesignated to attainment for a particular criteria pollutant.

The amendments confirm that the BPA area is no longer subject to NNSR. As discussed previously in this preamble, on October 20, 2010, EPA published the redesignation of the BPA area to attainment for the 1997 eight-hour ozone NAAQS, and a determination that the BPA area had attained the one-hour ozone NAAQS. In this action, EPA determined that the BPA area need not be subject to NNSR as an anti-backsliding requirement. Thus, under the amendment to §116.150(a)(1), the BPA area is not subject to NNSR for either the one-hour ozone or 1997 eight-hour ozone NAAQS. Additionally, the amendments confirm that the El Paso area is no longer subject to NNSR. On January 15, 2009, EPA published its approval of a maintenance plan for the El Paso area for the 1997 eight-hour ozone standard. As discussed previously in this preamble, in EPA's October 20, 2010, action for the BPA area, EPA stated that "we no longer believe that the Clean Air Act requires a separate 110(l) analysis to replace 1-hour nonattainment NSR with PSD once an area has . . . an approved 110(a)(1) maintenance plan for that standard" (see 75 *Federal Register* 64677). Taken together, these statements reflect an EPA determination that NNSR is no longer required for purposes of anti-backsliding for the El Paso area. Thus, under the amendment to §116.150(a)(4), the El Paso area is not subject to NNSR for either the one-hour ozone or 1997 eight-hour ozone NAAQS.

This is an issue of extreme importance to the commission, the regulated community and the public, and there should be no room for ambiguity or argument. In an effort to ensure that TCEQ regulatory requirements regarding the NNSR permitting program are clear, meet the requirements of the FCAA, and are approvable into the SIP, the commission is adopting the following amendments to eliminate any deficiencies that would prevent approval of the rule changes.

Additionally, in order to prevent future confusion over designations and classifications and their related applicability thresholds and emissions offset requirements, the commission is adopting concurrent amendments to the definitions of maintenance area, and nonattainment area in 30 TAC Chapter 101, General Air Quality Rules.

Section by Section Discussion

§116.12, Nonattainment and Prevention of Significant Deterioration Review Definitions

The commission is changing footnote 1 in Table I, paragraph (18)(A) to remove the reference to the CFR and replace it with a reference the definition of "Nonattainment area" in 30 TAC §101.1. This reference is no longer necessary because the definition of nonattainment is being updated and also references the appropriate part of the CFR. The commission is also changing the term "major modification level" to "significant level" in footnote 2 in Table 1 in §116.12(18)(A). This will ensure that the term used in the footnote matches the heading in the third column of the table and help eliminate any confusion resulting from the use of different terms. The commission is also removing footnotes 6 and 7 from Table 1 in §116.12(18)(A).

The commission is making a change from the proposal to remove the second sentence of footnote 3 of Table I in §116.12(18) regarding the El Paso ozone nonattainment area. As the result of the EPA's final notice regarding the Beaumont/Port Arthur ozone nonattainment area redisignation (see 75 *Federal Register* 64675, October 20, 2010), which clarified the EPA's approval of the El Paso area's eight-hour ozone nonattainment maintenance plan, the requirement for El Paso in footnote 3 is no longer necessary.

Footnote 6 indicates that the EPA must complete rulemaking before NSR applications are evaluated according to their one-hour classification. However, the EPA has stated that: the *South Coast* decision is self-implementing; did not require rulemaking by the EPA to be effective; and NSR applications should be evaluated based upon one-hour classifications, if they are more stringent than an area's eight-hour classification, and has specifically disapproved footnote 6 (see 75 Federal Register 56424, September 15, 2010). Footnote 7 states that permit applications in areas designated as nonattainment for ozone under FCAA, Title I, Part D, Subpart 1 (42 United States Code (USC), §7502) will be evaluated as if that area was designated as Marginal. However, Texas does not have any areas currently designated as nonattainment for ozone under FCAA, Title I, Part D, Subpart 1. The San Antonio area was originally designated nonattainment-deferred for the 1997 eight-hour ozone NAAQS, but has since been designated attainment.

§116.150, New Major Source or Major Modification in Ozone Nonattainment Areas

The commission is amending §116.150(a) by removing §116.150(a)(1) and (2). Subsection (a) would then be amended to apply the requirements of this subsection as of the date of issuance of the permit and to add a requirement for continued applicability of NNSR until the EPA has made a finding of at-

tainment; the EPA has approved the removal of nonattainment NSR requirements from the area; the EPA has determined that PSD requirements apply in the area; or that nonattainment NSR is no longer required for the purposes of antibacksliding.

The commission is also removing §116.150(d) from the rule. Subsection (d) contains language similar to that in footnote 6 to Table 1 in §116.12(18)(A). This language indicates that the EPA must complete rulemaking before NSR applications are evaluated according to their one-hour classification. However, the EPA has stated that: the *South Coast* decision is self-implementing; did not require rulemaking by the EPA to be effective; and NSR applications should be evaluated based upon one-hour classifications, if they are more stringent than an area's eight-hour classification, and has specifically disapproved §116.150(d) and similar language in footnote 6 (see 75 *Federal Register* 56424, September 15, 2010). Additionally, the netting requirement and exceptions in §116.150(d) are redundant to the same requirement and exceptions in §116.150(c) and thus, unnecessary. The commission is also renumbering the remainder of §116.150 to reflect the removal of §116.150(d) and minor changes to references in §116.150(b) to reflect the renumbering. The commission is changing §116.150(e) to reflect changes in a concurrent rulemaking in Chapter 101.

As the result of comments received on the proposal of these amendments the commission is changing: §116.150(a)(1) - (4) to make clear that the conditions on which these exceptions are based must exist on the date of issuance of the permit; §116.150(d)(3)(A) to make clear that this exception only applies in a serious or severe ozone nonattainment area; and §116.150(d)(3)(B) to make clear that this exception only applies in a serious or severe ozone nonattainment area and to specifically state that the best available control technology (BACT) equivalent required by the rule is federal BACT as identified in §116.160(c)(1)(A).

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the revisions is to remove certain definitions that are duplicative, and to remove previously adopted contingency language that would require EPA final rulemaking before NSR applications are evaluated according to the one-hour classification of the area where the facility is located. These changes will not adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state in a material way since they codify the effect a federal district court ruling that has been upheld by the United States Supreme Court in *South Coast,* as discussed elsewhere in this preamble.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rules would implement requirements of the FCAA. Under 42 USC, §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. Additionally, once states have developed SIPs, and those plans are approved by the EPA, the FCAA prescribes, in 42 USC, §7502(e) that the EPA, in modifying a NAAQS, shall promulgate rules that apply to all areas that have not attained the previous NAAQS that provide for controls that are no less stringent than the controls that previously applied to the area. The district court in *South Coast* found that NSR was a "control," and vacated the EPA's Phase I rules that provided that the major source thresholds and offset requirements that applied as a result of an area's designation and classification under the one-hour ozone standard were no longer necessary. Until the EPA completes rulemaking to further interpret the applicability of the NSR permitting program in the context of 42 USC, §7502(e) and revisions to the ozone NAAQS, state rules that allow NSR review to rely upon designations and classifications for the eight-hour ozone standard in areas previously designated nonattainment for the one-hour ozone standard conflict with the *South Coast* ruling.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost

estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the adopted rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and in fact creates no additional impacts since the rules do not exceed the requirement to attain and maintain the NAAQS. For these reasons, the adopted rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law, including the SIP. In addition, these rules do not exceed any contract between the state and a federal agency.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation" *(Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ). Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (see Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The adopted rules implement requirements of the FCAA, specifically to adopt and implement SIPs to attain and maintain the NAAQS, including a requirement to adopt and implement permit programs. The specific intent of the adopted rule revisions is to remove certain definitions that are duplicative, and previously adopted contingency language that would require EPA final rulemaking before NSR applications are evaluated according to the one-hour classification of the area where the facility is located, in order to avoid conflict with the *South Coast* decision. These amendments were not developed solely under the general powers of the agency, but are authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of these rules, including Texas Health and Safety Code, §§382.011, 382.012, and 382.017. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this rulemaking action, as discussed elsewhere in this preamble, is to remove certain definitions that are duplicative, and previously adopted contingency language that would require EPA final rulemaking before NSR applications are evaluated according to the one-hour classification of the area where the facility is located.

The adopted rules will not create any additional burden on private real property. The rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. This rulemaking also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the CMP,

commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). These amendments will indirectly benefit the environment because reduced emissions resulting from the more stringent major source thresholds and emission offset requirements of the one-hour ozone standard ensure that there will be fewer adverse impacts to public health and the environment. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 116 is an applicable requirement of 30 TAC Chapter 122, Federal Operating Permits Program. Owners and operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements. Additionally, sources subject to the adopted rules may become subject to the federal operating permit program.

Public Comment

The commission held a public hearing on September 20, 2010. The comment period closed on September 27, 2010. The commission received comments from The United States Environmental Protection Agency (EPA), the Texas Industry Project (TIP), and Zephyr Environmental Corp. (ZEC).

RESPONSE TO COMMENTS

The EPA commented that most of TCEQ's proposed changes meet federal requirements. The EPA also stated that TCEQ makes it clear that NNSR applies based on the attainment status of the area where the source is located on the date of permit issuance rather than the date of submittal of a complete permit application.

The commission appreciates the EPA's support.

The EPA commented that the exceptions to the requirement for NNSR based on nonattainment status on the date of issuance of the permit in §116.150(a)(1-4) must also exist on the date of issuance of the permit in order to apply.

The commission agrees with this comment and is making changes to §116.150(a)(1) - (4) to make clear that the conditions on which these exceptions are based must exist on the date of issuance of the permit.

The EPA also commented that the exception in §116.150(d)(3)(A) that allows major stationary sources with a potential to emit less than 100 tpy to forego NNSR if the project increases are offset by a ratio of 1.3 to 1 only applies in serious or severe ozone nonattainment areas.

The commission agrees with this comment and is changing §116.150(d)(3)(A) to make clear that this exception only applies in a serious or severe ozone nonattainment area.

The EPA commented that the exception in §116.150(d)(3)(B) that allows major stationary sources with a potential to emit greater than 100 tpy to substitute BACT for lowest achievable emissions rate is limited to serious and severe ozone nonattainment area and must specify the federal definition of BACT rather than the state BACT for minor sources.

The commission agrees with this comment and is changing §116.150(d)(3)(B) to make clear that this exception only applies in a serious or severe ozone nonattainment area. Additionally, the commission is changing §116.150(d)(3)(B) to specifically state that the BACT equivalent required by the rule is federal BACT as identified in §116.160(c)(1)(A).

TIP commented that this rulemaking was unnecessary: to ensure anti-backsliding for any Texas ozone nonattainment area; because it would be superseded by a pending EPA rulemaking; and because it would create an undue hardship for business.

The commission respectfully disagrees with the comments. Due to EPA's inconsistent positions on anti-backsliding requirements and failure to complete rulemaking to fully implement the D.C. Circuit's opinion in *South Coast v. EPA,* as discussed earlier in this preamble, there has been confusion and concern regarding anti-backsliding requirements, as reflected in other comments received on this rulemaking. The rulemaking was necessary to remove prior adopted rule language that conflicted with then-applicable EPA guidance regarding applicability of major source thresholds and emission offset requirements. The commission constantly strives for clarity in its rules, in order for all interested persons to both understand and implement commission rules appropriately under state law. As discussed earlier in this preamble, EPA has issued a final rule redesignating the BPA area as attainment for the 1997 eight-hour ozone standard, and discussing NSR requirements that apply in the BPA area as of October 20, 2010, (75 *Federal Register* 64675). While this final rule provides additional guidance regarding EPA's opinions concerning anti-backsliding requirements, this rule does not have general applicability, and therefore, does not resolve these issues statewide, as assumed by the commenter. Additionally, as discussed elsewhere in this preamble, EPA specifically disapproved the rule language currently in effect regarding anti-backsliding in §116.10(18) and §116.150(d). Regarding the commenters concern that the rule, if adopted, would create an undue hardship for business, the commenter provided no information to support either the type or scope of hardship. No changes were made to the rules as a result of these comments.

Zephyr commented that it supported the changes to §116.150(a)(1) - (4) and TCEQ's efforts to obtain a one-hour ozone attainment designation from the EPA for El Paso County.

The commission appreciates Zephyr's support.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.12

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code; Texas Health and Safety

Code, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act (TCAA); §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the proper control of the state's air; and §382.051, concerning Permitting Authority of the Commission, which authorizes the commission to issue permits to construct a new facility or modify an existing facility that may emit air contaminants, and authority to adopt rules necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA.

The amendment implements Texas Water Code, §5.103; and Texas Health and Safety Code, §§382.017, 382.012, and 382.051.

§116.12. Nonattainment and Prevention of Significant Deterioration Review Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas. In addition to the terms that are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and Chapter 116, Subchapter C, Division 1 of this title (relating to Plant-Wide Applicability Limits), have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) Allowable emissions--The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits that restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards specified in 40 Code of Federal Regulations Part 60 or 61;

(B) the applicable state implementation plan emissions limitation including those with a future compliance date; or

(C) the emissions rate specified as a federally enforceable permit condition including those with a future compliance date.

(3) Baseline actual emissions--The rate of emissions, in tons per year, of a federally regulated new source review pollutant.

(A) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five-year period immediately preceding when the owner or operator begins actual construction of the project. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(B) For an existing facility (other than an electric utility steam generating unit), baseline actual emissions means the average rate, in tons per year, at which the facility actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the ten-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received for a permit. The rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply with the exception of those required under 40 Code of Federal Regulations Part 63, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.

(C) For a new facility, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and for all other purposes during the first two years following initial operation, shall equal the unit's potential to emit.

(D) The actual average rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period. For each regulated new source review pollutant, when a project involves multiple facilities, only one consecutive 24-month period must be used to determine the baseline actual emissions for the facilities being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant. The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount. Baseline emissions cannot occur prior to November 15, 1990.

(E) The actual average emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as resulting from planned maintenance, startup, or shutdown activities; historically unauthorized; and subject to reporting under Chapter 101 of this title (relating to General Air Quality Rules) shall be included to the extent that they have been authorized.

(4) Basic design parameters--For a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British thermal units content shall be used for determining the basic design parameters for a coal-fired electric utility steam generating unit. The basic design parameters for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator shall consider the primary product or primary raw material when selecting a basic design parameter. The owner or opera-

tor may propose an alternative basic design parameter for the source's process units to the executive director if the owner or operator believes the basic design parameter as defined in this paragraph is not appropriate for a specific industry or type of process unit. If the executive director approves of the use of an alternative basic design parameter, that basic design parameter shall be identified and compliance required in a condition in a permit that is legally enforceable.

(A) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter.

(B) If design information is not available for a process unit, the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(C) Efficiency of a process unit is not a basic design parameter.

(5) Begin actual construction--In general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities that mark the initiation of the change.

(6) Building, structure, facility, or installation--All of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities are considered to be part of the same industrial grouping if they belong to the same "major group" (i.e., that have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(7) Clean coal technology--Any technology, including technologies applied at the precombustion, combustion, or post-combustion stage, at a new or existing facility that will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam that was not in widespread use as of November 15, 1990.

(8) Clean coal technology demonstration project--A project using funds appropriated under the heading "Department of Energy-Clean Coal Technology," up to a total amount of $2.5 billion for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States Environmental Protection Agency. The federal contribution for a qualifying project shall be at least 20% of the total cost of the demonstration project.

(9) Commence--As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

(11) Contemporaneous period--For major sources the period between:

(A) the date that the increase from the particular change occurs; and

(B) 60 months prior to the date that construction on the particular change commences.

(12) *De minimis* threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment or prevention of significant deterioration review. The summation of the proposed project emission increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the significant level for that pollutant. If the significant level is exceeded, then prevention of significant deterioration and/or nonattainment review is required.

(13) Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(14) Federally regulated new source review pollutant--As defined in subparagraphs (A) - (D) of this paragraph:

(A) any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the United States Environmental Protection Agency;

(B) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111;

(C) any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI; or

(D) any pollutant that otherwise is subject to regulation under the FCAA; except that any or all hazardous air pollutants either listed in FCAA, §112 or added to the list under FCAA, §112(b)(2), which have not been delisted under FCAA, §112(b)(3), are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under FCAA, §108.

(15) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, §7411, and that reflects the following:

(A) the most stringent emission limitation that is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B) the most stringent emission limitation that is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(16) Major facility--Any facility that emits or has the potential to emit 100 tons per year or more of the plant-wide applicability limit (PAL) pollutant in an attainment area; or any facility that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant in Table I of this section for nonattainment areas.

(17) Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs) for which a national ambient air quality standard has been issued. The major source thresholds are identified in Table I of this section for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations (CFR) §51.166(b)(1). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR §51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR §51.165(a)(1)(iv)(C).

(18) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source. At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations §51.166(b)(1) and (23), respectively.
Figure: 30 TAC §116.12(18)(A)

(B) A physical change or change in the method of operation shall not include:

(i) routine maintenance, repair, and replacement;

(ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, §2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act;

(iii) use of an alternative fuel by reason of an order or rule of 42 United States Code, §7425;

(iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) use of an alternative fuel or raw material by a stationary source that the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to use under any permit issued under regulations approved under this chapter;

(vi) an increase in the hours of operation or in the production rate (unless the change is prohibited under any federally enforceable permit condition that was established after December 21, 1976);

(vii) any change in ownership at a stationary source;

(viii) any change in emissions of a pollutant at a site that occurs under an existing plant-wide applicability limit;

(ix) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated;

(x) for prevention of significant deterioration review only, the installation or operation of a permanent clean coal technology demonstration project that constitutes re-powering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis; or

(xi) for prevention of significant deterioration review only, the reactivation of a clean coal-fired electric utility steam generating unit.

(19) Necessary preconstruction approvals or permits--Those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations that are part of the applicable state implementation plan.

(20) Net emissions increase--The amount by which the sum of the following exceeds zero: the project emissions increase plus any sourcewide creditable contemporaneous emission increases, minus any sourcewide creditable contemporaneous emission decreases. Baseline actual emissions shall be used to determine emissions increases and decreases.

(A) An increase or decrease in emissions is creditable only if the following conditions are met:

(i) it occurs during the contemporaneous period;

(ii) the executive director has not relied on it in issuing a federal new source review permit for the source and that permit is in effect when the increase in emissions from the particular change occurs; and

(iii) in the case of prevention of significant deterioration review only, an increase or decrease in emissions of sulfur dioxide, particulate matter, or nitrogen oxides that occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(B) An increase in emissions is creditable if it is the result of a physical change in, or change in the method of operation of a stationary source only to the extent that the new level of emissions exceeds the baseline actual emission rate. Emission increases at facilities under a plant-wide applicability limit are not creditable.

(C) A decrease in emissions is creditable only to the extent that all of the following conditions are met:

(i) the baseline actual emission rate exceeds the new level of emissions;

(ii) it is federally enforceable at and after the time that actual construction on the particular change begins;

(iii) the executive director has not relied on it in issuing a prevention of significant deterioration or a nonattainment permit;

(iv) the decrease has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(v) in the case of nonattainment applicability analysis only, the state has not relied on the decrease to demonstrate attainment or reasonable further progress.

(D) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(21) Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, §7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order for a reduction to qualify as an offset, it must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and Trading; or Discrete Emission Credit Banking and Trading), except as provided for in §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(22) Plant-wide applicability limit--An emission limitation expressed, in tons per year, for a pollutant at a major stationary source, that is enforceable and established in a plant-wide applicability limit permit under §116.186 of this title (relating to General and Special Conditions).

(23) Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit. The plant-wide applicability limit effective date for a plant-wide applicability limit established in an existing flexible permit is the date that the flexible permit was issued.

(24) Plant-wide applicability limit major modification--Any physical change in, or change in the method of operation of the plant-wide applicability limit source that causes it to emit the plant-wide applicability limit pollutant at a level equal to or greater than the plant-wide applicability limit.

(25) Plant-wide applicability limit permit--The new source review permit that establishes the plant-wide applicability limit.

(26) Plant-wide applicability limit pollutant--The pollutant for which a plant-wide applicability limit is established at a major stationary source.

(27) Potential to emit--The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, may be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions, as defined in 40 Code of Federal Regulations §51.165(a)(1)(viii), do not count in determining the potential to emit for a stationary source.

(28) Project net--The sum of the following: the project emissions increase, minus any sourcewide creditable emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Baseline actual emissions shall be used to determine emissions increases and decreases. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(29) Projected actual emissions--The maximum annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator of the major stationary source shall include unauthorized emissions from planned maintenance, startup, or shutdown activities, which were historically unauthorized and subject to reporting under Chapter 101 of this title, to the extent they have been authorized, or are being authorized; and fugitive emissions to the extent quantifiable; and shall consider all relevant information, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan.

(30) Project emissions increase--The sum of emissions increases for each modified or affected facility determined using the following methods:

(A) for existing facilities, the difference between the projected actual emissions and the baseline actual emissions. In calculating any increase in emissions that results from the project, that portion of the facility's emissions following the project that the facility could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth may be excluded from the project emission increase. The potential to emit from the facility following completion of the project may be used in lieu of the projected actual emission rate; and

(B) for new facilities, the difference between the potential to emit from the facility following completion of the project and the baseline actual emissions.

(31) Replacement facility--A facility that satisfies the following criteria:

(A) the facility is a reconstructed unit within the meaning of 40 Code of Federal Regulations §60.15(b)(1), or the facility replaces an existing facility;

(B) the facility is identical to or functionally equivalent to the replaced facility;

(C) the replacement does not alter the basic design parameters of the process unit;

(D) the replaced facility is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable. If the replaced facility is brought back into operation, it shall constitute a new facility. No creditable emission reductions shall be generated from shutting down the existing facility that is replaced. A replacement facility is considered an existing facility for the purpose of determining federal new source review applicability.

(32) Secondary emissions--Emissions that would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that would

not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions that come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(33) Significant facility--A facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an amount that is equal to or greater than the significant level for that PAL pollutant.

(34) Small facility--A facility that emits or has the potential to emit the plant-wide applicability limit (PAL) pollutant in an amount less than the significant level for that PAL pollutant.

(35) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant subject to regulation under 42 United States Code, §§7401 *et seq.*

(36) Temporary clean coal technology demonstration project--A clean coal technology demonstration project that is operated for a period of five years or less, and that complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100545
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 3, 2011
Proposal publication date: August 27, 2010
For further information, please call: (512) 239-0177

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SUBCHAPTER B. NEW SOURCE REVIEW PERMITS
DIVISION 5. NONATTAINMENT REVIEW PERMITS

30 TAC §116.150

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code; Texas Health and Safety Code, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act (TCAA); §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a comprehensive plan for the proper control of the state's air; and §382.051, concerning Permitting Authority of the Commission, which authorizes the commission to issue permits to construct a new facility or modify an existing facility that may emit air contaminants, and authority to adopt rules necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA.

The adopted amendment implements Texas Water Code, §5.103; and Texas Health and Safety Code, §§382.017, 382.012, and 382.051.

§116.150. New Major Source or Major Modification in Ozone Nonattainment Areas.

(a) This section applies to all new source review authorizations for new construction or modification of facilities that will be located in any area designated as nonattainment for ozone under 42 United States Code (USC), §§7407 *et seq.* as of the date of issuance of the permit, unless the following apply on the date of issuance of the permit:

(1) the United States Environmental Protection Agency (EPA) has made a finding of attainment;

(2) the EPA has approved the removal of nonattainment New Source Review requirements from the area;

(3) the EPA has determined that Prevention of Significant Deterioration requirements apply in the area; or

(4) the EPA determines that nonattainment NSR is no longer required for purposes of antibacksliding.

(b) The owner or operator of a proposed new major stationary source, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) of volatile organic compound (VOC) emissions or nitrogen oxides (NO_x) emissions, or the owner or operator of an existing stationary source of VOC or NO_x emissions that will undergo a major modification, as defined in §116.12 of this title with respect to VOC or NO_x, shall meet the requirements of subsection (d)(1) - (4) of this section, except as provided in subsection (e) of this section. Table I, located in the definition of major modification in §116.12 of this title, specifies the various classifications of nonattainment along with the associated emission levels that designate a major stationary source and significant level for those classifications.

(c) Except as noted in subsection (e) of this section regarding NO_x, the de minimis threshold test (netting) is required for all modifications to existing major sources of VOC or NO_x, unless at least one of the following conditions are met:

(1) the proposed emissions increases associated with a project, without regard to decreases, is less than five tons per year (tpy) of the individual nonattainment pollutant in areas classified under Federal Clean Air Act (FCAA), Title I, Part D, Subpart 2 (42 USC, §7511) classified as Serious or Severe;

(2) the proposed emissions increases associated with a project, without regard to decreases, is less than 40 tpy of the individual nonattainment pollutant in areas classified under FCAA, Title I, Part D, Subpart 1 (42 USC, §7502) and for those under FCAA, Title I, Part D, Subpart 2 (42 USC, §7511) classified as Marginal or Moderate; or

(3) the project emissions increases are less than the significant level stated in Table I located in the definition of major modification in §116.12 of this title and when coupled with project actual emissions decreases for the same pollutant, summed as the project net, are less than or equal to zero tpy.

(d) In applying the *de minimis* threshold test, if the net emissions increases are greater than the significant levels stated in Table I located in the definition of major modification in §116.12 of this title, the following requirements apply.

(1) The proposed facility shall comply with the lowest achievable emission rate (LAER) as defined in §116.12 of this title for the nonattainment pollutants for which the facility is a new major source or major modification except as provided in paragraph (3)(B) of this subsection and except for existing major stationary sources that have a potential to emit (PTE) of less than 100 tpy of the applicable nonattainment pollutant. For these sources, best available control technology (BACT) can be substituted for LAER. LAER shall otherwise be applied to each new facility and to each existing facility at which the net emissions increase will occur as a result of a physical change or change in method of operation of the unit.

(2) All major stationary sources owned or operated by the applicant (or by any person controlling, controlled by, or under common control with the applicant) in the state must be in compliance or on a schedule for compliance with all applicable state and federal emission limitations and standards.

(3) At the time the new or modified facility or facilities commence operation, the emissions increases from the new or modified facility or facilities must be offset. The proposed facility shall use the offset ratio for the appropriate nonattainment classification as defined in §116.12 of this title and shown in Table I located in the definition of major modification in §116.12 of this title. Internal offsets that are generated at the source and that otherwise meet all creditability criteria can be applied as follows.

(A) Major stationary sources located in a serious or severe ozone nonattainment area with a PTE of less than 100 tpy of an applicable nonattainment pollutant are not required to undergo nonattainment new source review under this section, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1.

(B) Major stationary sources located in a serious or severe ozone nonattainment area with a PTE of greater than or equal to 100 tpy of an applicable nonattainment pollutant can substitute federal BACT (as identified in §116.160(c)(1)(A) of this title (relating to Prevention of Significant Deterioration Requirements) for LAER, if the project increases are offset with internal offsets at a ratio of at least 1.3 to 1. Internal offsets used in this manner can also be applied to satisfy the offset requirement.

(4) In accordance with the FCAA, the permit application must contain an analysis of alternative sites, sizes, production processes, and control techniques for the proposed source. The analysis must demonstrate that the benefits of the proposed location and source configuration significantly outweigh the environmental and social costs of that location.

(e) For sources located in the El Paso ozone nonattainment area as defined in 40 Code of Federal Regulations, Part 81, the requirements of this section do not apply to NO_x emissions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 11, 2011.

TRD-201100546
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 3, 2011
Proposal publication date: August 27, 2010
For further information, please call: (512) 239-0177

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 7. SURVEYING

31 TAC §§7.1 - 7.4, 7.6, 7.7

The General Land Office (GLO) adopts the repeal of certain sections in Title 31, Part 1, Chapter 7 of the Texas Administrative Code. The sections repealed are §7.1, relating to Forms, §7.2, relating to Coastal Lands, §7.3, relating to Deeds of Acquittance, §7.4, relating to Corrected Patents, §7.6, relating to Surveyor's Maps or Plats, and §7.7, relating to Surveyor's Reports, General. These sections are repealed without changes to the proposal as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10904) and will not be republished. The repeal results from the quadrennial review of Chapter 7, required by Texas Government Code §2001.039.

BACKGROUND AND ANALYSIS OF REPEALED SECTIONS

Following the publication of its Notice of Intent to Review in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5583), the GLO reviewed all rules in Chapter 7 and determined that some of these rules should be modified. In order to accomplish the modification of these rules, the GLO determined that the rules to be modified should be repealed and, immediately thereafter, replacement rules should be adopted in their place. Therefore, concurrently with this repeal of §§7.1 - 7.4, 7.6, and 7.7, the GLO is adopting new §§7.1 - 7.4, 7.6, and 7.7 that will replace the repealed sections. The sections to be adopted have been modified to make the rules more clear and comprehensible to the public and to the GLO. Additionally, the sections to be adopted have been modified to more accurately reflect the current practices and policies of the GLO.

REASONED JUSTIFICATION FOR REPEAL

The public will benefit from the repeal of these sections because the adoption of the new rules to replace the repealed sections will streamline the various processes related to surveying public lands and provide the public with a clearer understanding of the policies and procedures of the GLO related thereto.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO evaluated the repeal of these sections in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The repeal of these sections is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

PUBLIC COMMENT REQUEST

No comments were received on the repealed sections.

STATUTORY AUTHORITY

The repeal of these sections is made pursuant to Texas Natural Resources Code §31.051(3), which authorizes the Commissioner of the GLO to make and enforce suitable rules consistent with the law.

STATUTORY SECTIONS AFFECTED

Texas Natural Resources Code Chapter 21, relating to Surveys and Surveyors; and Texas Natural Resources Code Chapter 33, relating to the Management of Coastal Public Land; and Texas Natural Resources Code Chapter 51, relating to Land, Timber, and Surface Resources are affected by the repeal of these sections.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100585
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: March 6, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 475-1859

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31 TAC §§7.1 - 7.4, 7.6, 7.7

The General Land Office (GLO) adopts new sections as part of Title 31, Part 1, Chapter 7 of the Texas Administrative Code. The new sections adopted are §7.1, relating to Forms, §7.2, relating to Coastal Lands, §7.3, relating to Deeds of Acquittance, §7.4, relating to Corrected Patents, §7.6, relating to Surveyor's Plats, and §7.7, relating to Surveyor's Reports, General. These sections are adopted without changes as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10905). The adoption of these rules results from the quadrennial review of Chapter 7, required by Texas Government Code §2001.039.

BACKGROUND AND SECTION-BY-SECTION ANALYSIS

Following the publication of a Notice of Intent to Review in the June 25, 2010, issue of the *Texas Register* (35 TexReg 5583), the GLO reviewed all rules in Chapter 7 and determined that some of these rules should be modified. In order to accomplish the modification of these rules, the GLO determined that the rules to be modified should be repealed and, immediately thereafter, replacement rules should be adopted in their place. Therefore, concurrently with the repeal of §§7.1 - 7.4, 7.6, and 7.7, the GLO is adopting new §§7.1 - 7.4, 7.6, and 7.7 that will replace the repealed sections. The new sections have been modified to make the rules more clear and comprehensible to the public and to the GLO. Additionally, the new sections have been modified to more accurately reflect the current practices and policies of the GLO.

Adopted §7.1 (relating to Forms) requires the GLO to provide surveyors with the correct forms for field notes and corrected field notes.

Adopted §7.2 (relating to Coastal Lands) defines the various terms used in the rule; describes the GLO's requirements for performing a coastal boundary survey and preparing field notes and survey plat of a coastal boundary survey; and describes the GLO's requirements for performing a coastal boundary survey relating to an erosion response activity and preparing field notes and survey plat of a coastal boundary survey relating to an erosion response activity.

Adopted §7.3 (relating to Deeds of Acquittance) describes the GLO's requirements for performing a survey and preparing field notes, plats, and surveyor's reports of a survey related to the issuance of a deed of acquittance.

Adopted §7.4 (relating to Corrected Patents) describes the GLO's requirements for performing a survey and preparing corrected field notes, plats, and surveyor's reports of a survey related to the issuance of a corrected patent.

Adopted §7.6 (relating to Surveyor's Plats) describes the GLO's requirements for a surveyor's plat to be submitted to the GLO in connection with vacancy filings or applications to purchase excess acreage.

Adopted §7.7 (relating to Surveyor's Reports, General) describes the GLO's requirements for the preparation of surveyor's reports to be submitted to the GLO.

REASONED JUSTIFICATION FOR ADOPTION

The public will benefit from the adoption of these rules because it will streamline the various processes related to surveying public lands, and provide the public with a clearer understanding of the policies and procedures of the GLO related thereto.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO evaluated the adoption of these rules in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The adoption of these rules is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

PUBLIC COMMENT REQUEST

No comments were received on the adopted sections.

STATUTORY AUTHORITY

The adoption of these rules is made pursuant to Texas Natural Resources Code §31.051(3), which authorizes the Commissioner of the GLO to make and enforce suitable rules consistent with the law.

STATUTORY SECTIONS AFFECTED

The adoption of these rules affects Texas Natural Resources Code Chapter 21, relating to Surveys and Surveyors; and Texas Natural Resources Code Chapter 33, relating to the Management of Coastal Public Land; and Texas Natural Resources Code Chapter 51, relating to Land, Timber, and Surface Resources.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100586
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: March 6, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 475-1859

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER H. TAX RECORD REQUIREMENTS

34 TAC §9.3031

The Comptroller of Public Accounts adopts an amendment to §9.3031, concerning rendition forms, without changes to the proposed text as published in the December 31, 2010, issue of the *Texas Register* (35 TexReg 11819). This section is being amended to change the title of the General Real Estate Rendition of Taxable Property Form and to increase administrative efficiency by providing for comptroller revision of applicable forms.

No comments were received regarding adoption of the amendment.

This amendment is adopted pursuant to Tax Code, §22.24.

This amendment implements Tax Code, §22.24.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 9, 2011.

TRD-201100525
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: March 1, 2011
Proposal publication date: December 31, 2010
For further information, please call: (512) 936-6472

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 153. INTERNAL INQUIRIES

SUBCHAPTER A. INVESTIGATIONS OF ABUSE, NEGLECT, OR EXPLOITATION IN A FACILITY OPERATED BY THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE

37 TAC §§153.1 - 153.7

The Texas Board of Criminal Justice adopts the repeal of §§153.1 - 153.7, concerning Investigations of Abuse, Neglect, or Exploitation in a Facility Operated by the Texas Department of Criminal Justice (TDCJ), without changes to the proposal as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9672).

The purpose of the repeal is to eliminate a duplicative process for the investigation of allegations of abuse, neglect, or exploitation of an elderly or disabled offender in a facility operated by the TDCJ.

No comments were received.

The repeal is adopted under Texas Human Resources Code §48.301.

Cross Reference to Statutes: Texas Government Code §492.013.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100578
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 6, 2011
Proposal publication date: October 29, 2010
For further information, please call: (936) 437-6003

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SUBCHAPTER B. PRIVATE REAL PROPERTY RIGHTS PRESERVATION

37 TAC §153.20

The Texas Board of Criminal Justice adopts the repeal of §153.20, concerning Private Real Property Rights Affected by Governmental Action, without changes to the proposal as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9672).

The purpose of the repeal is to eliminate an unnecessary rule. The rule is unnecessary because the *Private Real Property Preservation Act* sets forth a procedure a governmental entity must follow to take real property that is privately owned and requires the Office of the Attorney General to publish guidelines that must be followed in the event of such taking.

No comments were received.

The repeal is adopted under Texas Government Code §§2007.001 - 2007.045.

Cross Reference to Statutes: Texas Government Code §492.013.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100581
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 6, 2011
Proposal publication date: October 29, 2010
For further information, please call: (936) 437-6003

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CHAPTER 156. INVESTIGATIONS

37 TAC §156.1

The Texas Board of Criminal Justice adopts new §156.1, concerning Investigations of Allegations of Abuse, Neglect, or Exploitation of an Elderly or Disabled Offender, without changes to the proposed text as published in the October 29, 2010, issue of the *Texas Register* (35 TexReg 9673).

The purpose of the new rule is to clarify the process for the investigation of allegations of abuse, neglect, or exploitation of an elderly or disabled offender received from the Texas Department of Family and Protective Services.

No comments were received.

The new rule is adopted under Texas Human Resources Code §48.301.

Cross Reference to Statutes: Texas Government Code §492.013.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 14, 2011.

TRD-201100575
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 6, 2011
Proposal publication date: October 29, 2010
For further information, please call: (936) 437-6003

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Department of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Final Action on Rules

ADOPTION OF REVISED WORKERS' COMPENSATION CLASSIFICATION RELATIVITIES AND AMENDMENTS TO THE TEXAS BASIC MANUAL OF RULES, CLASSIFICATIONS AND EXPERIENCE RATING PLAN FOR WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE UPDATING THE EXPECTED LOSS RATES AND DISCOUNT RATIOS TABLE

The Commissioner of Insurance (Commissioner) adopts the items proposed by the staff of the Texas Department of Insurance (Department) in a petition (Reference No. W-0910-09-I) filed with the Office of the Chief Clerk of the Department on September 30, 2010 and as revised in this Order. Notice of the proposal was published in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9375). The items were considered at a public hearing held under Docket No. 2720 on November 10, 2010, at 9:30 a.m., in Room 100 of the William P. Hobby Building, 333 Guadalupe Street, Austin, Texas. No comments were received on the proposal.

However, evidence was presented at a separate public hearing to review rates to be charged for workers' compensation insurance written in the state of Texas, held under Docket No. 2724 on November 10, 2010, at 9:30 a.m., in Room 100 of the William P. Hobby Building, 333 Guadalupe Street, Austin, Texas. Testimony indicated that loss experience has continued to improve. The Department has determined that a reduction in the proposed Texas workers' compensation classification relativities (classification relativities) as proposed in the petition is appropriate. The amendments to the Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance (Basic Manual) concerning the expected loss rates and discount ratios used in experience rating are adopted without changes to the proposed amendments.

The adopted items include (i) revised classification relativities to replace those adopted pursuant to Commissioner's Order No. 09-0104, dated February 19, 2009, as amended by Commissioner's Order No. 09-0181, dated March 20, 2009; and (ii) a revised table to amend the Basic Manual concerning the expected loss rates and discount ratios used in experience rating. The amendments to the Basic Manual are adopted without changes to the proposed text. The classification relativities are adopted with changes, as discussed as follows.

The average level of the current classification relativities is 54% of the average level of the 1994 classification relativities. The current average level of classification relativities was adopted pursuant to Commissioner's Order No. 09-0104, dated February 19, 2009, as amended by Commissioner's Order No. 09-0181, dated March 20, 2009, to better reflect improvements in experience that had emerged over time. Recent data and projections show that Texas loss experience has continued to improve. Therefore, staff has determined that it is appropriate to further reduce the average level of the classification relativities, and proposes that each of the revised classification relativities be multiplied by a factor of 50/54, bringing the relativities to 50% of the average level of the 1994 relativities.

The Commissioner has jurisdiction over this matter pursuant to Article 5.96 and §2053.051 and §2053.052 of the Texas Insurance Code. Section 2053.051 requires the Department to determine hazards by class and establish classification relativities applicable to the payroll in each class for workers' compensation insurance. Section 2053.052 requires the Commissioner to adopt a uniform experience rating plan for workers' compensation insurance. Sections 2053.051 and 2053.052 further provide that the classification system and experience rating plan be revised at least once every five years. Article 5.96 authorizes the Department to prescribe, promulgate, adopt, approve, amend, or repeal standard and uniform manual rules, rating plans, classification plans, statistical plans, and policy and endorsement forms for various lines of insurance, including worker's compensation insurance.

The Commissioner has determined that it is necessary to revise the Basic Manual as proposed by staff in the September 30, 2010 petition and to reduce the classification relativities as discussed above in order to utilize the most recent experience data available. The schedule of revised classification relativities is displayed in Exhibit A and the table of expected loss rates and discount ratios for the Basic Manual is displayed in Exhibit B of this Order. Exhibits A and B are adopted and incorporated by reference into this Order.

This adoption is made pursuant to Article 5.96 of the Texas Insurance Code, which exempts actions taken under Article 5.96 from the requirements of the Administrative Procedures Act (Government Code, Title 10, Chapter 2001).

The Department herby certifies that the adopted revisions to the classification relativities and the amendments to the Basic Manual have been reviewed by legal counsel and found to be a valid exercise of the Department's authority.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the classification relativities proposed by the staff petition (Ref. No. W-0910-09-I), as revised and incorporated by reference into this Order, are adopted.

IT IS FURTHER ORDERED that the amendments to the Basic Manual proposed by the staff petition (Ref. No. W-0910-09-I) and incorporated by reference into this Order are adopted.

IT IS FURTHER ORDERED that the revised classification relativities are available for immediate use by insurers and that their use is mandatory for all policies with an effective date on or after June 1, 2011, unless the insurer files to use an alternative classification rate basis or files to use its own independent insurer-specific classification relativities.

IT IS FURTHER ORDERED that the amendments to the Basic Manual apply to all workers' compensation experience modifiers with an effective date on or after June 1, 2011.

TRD-201100535
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 10, 2011

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Final Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO TEXAS INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF AMENDMENTS TO THE TEXAS BASIC MANUAL OF RULES, CLASSIFICATIONS AND EXPERIENCE RATING PLAN FOR WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE AND TEXAS RETROSPECTIVE RATING PLAN MANUAL FOR WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE CONCERNING HAZARD GROUPS

The Commissioner of Insurance (Commissioner) adopts the amendments proposed by the staff of the Texas Department of Insurance (Department) in a petition (Reference No. W-1010-11-I) to amend Rule XIX - Deductible Programs of the Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance (Basic Manual) and Part Four - E of the Texas Retrospective Rating Plan Manual for Workers' Compensation and Employers' Liability Insurance (Retro Manual) concerning hazard groups, filed on October 11, 2010. Notice of the proposal was published in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9513). The hearing took place on November 10, 2010, under Docket No 2721. No comments were received on the proposal. The Table of Classifications by Hazard Group for both the Basic Manual and the Retro Manual have been changed to include twelve class codes and their hazard group that were inadvertently omitted in the proposed exhibits. With the exception of the aforementioned exhibits, the amendments are adopted without changes to the proposed text.

The following amendments are adopted:

Basic Manual Rule XIX is amended to add Section J, which is an expanded Table of Classifications by Hazard Group that expands the number of hazard groups from four to seven and updates the hazard group assignments to Texas classification codes in the Basic Manual. Basic Manual Rule XIX is also amended to update Section E. Premium Determination of the Basic Manual, to specify that the Table of Classifications by Hazard Group is located in Basic Manual Rule XIX, Section J. Retro Manual Part Four - E is amended to adopt the revised Table of Classifications by Hazard Group, which expands the number of hazard groups from four to seven and updates the hazard group assignments to Texas classification codes in the Retro Manual. The proposed revised Table of Classifications by Hazard Group will replace the current Table of Classifications by Hazard Group in Part Four - E of the Retro Manual.

The Commissioner has determined that the amendments to Basic Manual Rule XIX and Retro Manual Part Four - E are necessary to provide the following: a more precise classification of risks into more homogeneous groups, an improved ability to differentiate between classes, optimal pricing accuracy, and a more accurate distinction between risks with high large-loss potential and risks with low large-loss potential. Moreover, including the revised Table of Classifications by Hazard Group in both the Basic and the Retro Manuals will facilitate the ease of use of the Manuals.

A copy of the full text of the staff petition and related exhibits has been on file with the Office of the Chief Clerk of the Department since October 11, 2010, and are incorporated by reference into this Commissioner's Order.

This adoption is made pursuant to Articles 5.77 and 5.96 and §2053.051 of the Texas Insurance Code. Article 5.77 authorizes the Department to make or approve and promulgate premium rating plans that may be approved on an optional basis to apply prospectively or retrospectively and may include premium discount plans, retrospective rating plans or other systems, plans or formulas. Article 5.96 exempts action taken under this article from the requirements of the Administrative Procedure Act (Government Code, Title 10, Chapter 2001), authorizing the Department to prescribe, promulgate, adopt, approve, amend, or repeal standard and uniform manual rules, rating plans, classification plans, statistical plans, and policy and endorsement forms for various lines of insurance, including workers' compensation insurance. Section 2053.051 requires the Department to determine hazards by class.

The Department hereby certifies that the amendments to the Basic Manual and the Retro Manual have been reviewed by legal counsel and found to be a valid exercise of the Department's authority.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the amendments to the Basic Manual and the Retro Manual proposed by the staff petition (Reference No. W-1010-11-I), with the substitution of the Table of Classifications by Hazard Group revised to correct the inadvertent omission of twelve class codes and their hazard group, as described herein and set forth in the exhibit attached to this Order and incorporated into this Order by reference, be effective for all workers' compensation policies with an effective date on or after June 1, 2011.

TRD-201100536
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 10, 2011

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Final Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO TEXAS INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF AMENDMENTS TO RULE XIX OF THE TEXAS BASIC MANUAL OF RULES, CLASSIFICATIONS AND EXPERIENCE RATING PLAN FOR WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE UPDATING THE DEDUCTIBLE CREDIT TABLES FOR THE PROMULGATED DEDUCTIBLE PROGRAMS

The Commissioner of Insurance (Commissioner) adopts the amendments proposed by the staff of the Texas Department of Insurance (Department) in a petition (Reference No. W-1010-12-I) to amend Rule XIX - Deductible Programs of the Texas Basic Manual of Rules,

Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance (Basic Manual) to update the deductible credit tables for the three promulgated deductible programs, filed on October 11, 2010. Notice of the proposal was published in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9514). The hearing took place on November 10, 2010, under Docket No. 2722. No comments were received on the proposal. A change was made to correct a typographical error on Page R-50 of the Exhibit A attached to the order. The correction was made in the first box of Hazard Group A with an estimated annual premium range of $10,001 - $25,000. The box at the intersection of aggregate limit $25,000 and per accident deductible $10,000 now reads 24.5%, rather than 32.5%; and the box immediately to the right is now blank. With the exception of the aforementioned correction, the amendments are adopted without changes to the proposed text.

The following amendment to the Basic Manual is adopted:

Basic Manual Rule XIX is amended to update the deductible credit tables for the three promulgated deductible programs: per accident deductible, aggregate deductible, and per accident/aggregate deductible. The updated deductible credit tables reflect the change from four hazard groups to seven hazard groups, which was addressed in a separate order (Commissioner's Order No.11-0126), filed on February 10, 2011. The updated deductible credits are smaller than the deductible credits in the current tables. The change in the level of the deductible credits is due, in part, to the improved loss experience in Texas in recent years. The revised deductible credit tables will replace the tables on pages R-46 through R-54 of the Basic Manual.

The Commissioner has determined that the amendment to Basic Manual Rule XIX, containing updated deductible credit tables, is necessary to adjust the premium level for policyholders selecting one of the three promulgated deductible programs to be in compliance with the rate standard set forth in §2053.002(b) of the Texas Insurance Code.

A copy of the full text of the staff petition and related exhibits has been on file with the Office of the Chief Clerk of the Department since October 11, 2010, and are incorporated by reference into this Commissioner's Order.

This adoption is made pursuant to Article 5.96 and §2053.202 of the Texas Insurance Code. Article 5.96 exempts action taken under this article from the requirements of the Administrative Procedure Act (Government Code, Title 10, Chapter 2001), authorizing the Department to prescribe, promulgate, adopt, approve, amend, or repeal standard and uniform manual rules, rating plans, classification plans, statistical plans, and policy and endorsement forms for various lines of insurance, including workers' compensation insurance. Section 2053.202 provides that the Department shall require each insurance company writing workers' compensation insurance in Texas to offer at least three optional deductible plans adopted under this section that allow a policyholder to self-insure for the amount of the deductible.

The Department hereby certifies that the amendments to the Basic Manual have been reviewed by legal counsel and found to be a valid exercise of the Department's authority. as Department of Insurance

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the amendments to the Basic Manual proposed by the staff petition (Reference No. W-1010-12-I) as described herein and set forth in the exhibit attached to this Order and incorporated into this Order by reference, be effective for all workers' compensation policies with an effective date on or after June 1, 2011.

TRD-201100537

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 10, 2011

Final Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO TEXAS INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF AMENDMENTS TO THE TEXAS RETROSPECTIVE RATING PLAN MANUAL FOR WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE UPDATING PART FOUR - F AND PART FOUR - G

The Commissioner of Insurance (Commissioner) adopts the amendments proposed by the staff of the Texas Department of Insurance (Department) in a petition (Reference No. W-1010-13-I) to amend Part Four - F and Part Four - G of the Texas Retrospective Rating Plan Manual for Workers' Compensation and Employers' Liability Insurance (Retro Manual), filed on October 11, 2010. Notice of the proposal was published in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9514). The hearing took place on November 10, 2010, under Docket No. 2723. No comments were received on the proposal. Part Four - G of the Retro Manual has been changed to include the words "United States Longshore and Harbor Workers' Act" which were inadvertently omitted in the sentence below the table in the proposed exhibits. In addition, Part Four - F and Part Four - G have been amended to change the percentage to a decimal in the sentence below each table to correspond with the decimals in the table. With the exception of the aforementioned exhibits, the amendments are adopted without changes to the proposed text.

The following amendments to the Retro Manual are adopted:

Retro Manual Part Four - F is amended to update the table of Excess Loss Premium Factors, and Retro Manual in Part Four - G is amended to update the table of Longshore and Harbor Workers' Compensation Act (LHWCA) Excess Loss Premium Factors. The updated tables for the Excess Loss Premium Factors and the LHWCA Excess Loss Premium Factors reflect the change from four hazard groups to seven hazard groups which was addressed in a separate order (Commissioner's Order No. 11-0126), filed on February 10, 2011.

The Commissioner has determined that the amendments to Retro Manual Part Four - F and Part Four - G are necessary to update the excess loss premium factors to reflect the change from four hazard groups to seven, because excess loss premium factors vary by hazard group.

A copy of the full text of the staff petition and related exhibits has been on file with the Office of the Chief Clerk of the Department since October 11, 2010, and are incorporated by reference into this Commissioner's Order.

This adoption is made pursuant to Articles 5.77 and 5.96 of the Texas Insurance Code. Article 5.77 authorizes the Department to make or approve and promulgate premium rating plans that may be approved on an optional basis to apply prospectively or retrospectively and may include premium discount plans, retrospective rating plans or other systems, plans or formulas. Article 5.96 exempts action taken under this article from the requirements of the Administrative Procedure Act (Government Code, Title 10, Chapter 2001), authorizing the Department to prescribe, promulgate, adopt, approve, amend, or repeal standard and uniform manual rules, rating plans, classification plans, statistical plans, and policy and endorsement forms for various lines of insurance, including workers' compensation insurance.

The Department hereby certifies that the amendments to the Retro Manual have been reviewed by legal counsel and found to be a valid exercise of the Department's authority.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the amendments to the Retro Manual proposed by the staff petition (Reference No. W-1010-13-I) as described herein and set forth in the exhibit attached to this Order and incorporated into this Order by reference, be effective for all workers' compensation policies with an effective date on or after June 1, 2011.

TRD-201100538
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 10, 2011

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Criminal Justice

Title 37, Part 6

The Texas Board of Criminal Justice files this notice of intent to review §163.34, concerning Carrying of Weapons. This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the public should be received within 30 days of the publication of this proposed rule review.

TRD-201100583
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: February 14, 2011

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The Texas Board of Criminal Justice files this notice of intent to review §163.46, concerning Allocation Formula for Community Corrections Program. This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

TRD-201100577
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: February 14, 2011

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The Texas Board of Criminal Justice files this notice of intent to review §§195.71 - 195.78, concerning drug and alcohol testing of offenders under supervision of the Texas Department of Criminal Justice Parole Division. This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

TRD-201100570
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: February 14, 2011

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Adopted Rule Reviews

Department of Information Resources

Title 1, Part 10

The Texas Department of Information Resources (department) has completed its review of 1 Texas Administrative Code Chapter 211, relating to Information Resources Managers, pursuant to §2001.039, Texas Government Code, which requires agency rules to be reviewed at least every four years. The department determined that the reasons for initially adopting 1 Texas Administrative Code Chapter 211 continue to exist. The department, therefore, is readopting Chapter 211, concerning Information Resources Managers.

Notice of the rule review was published in the November 12, 2010, issue of the *Texas Register* (35 TexReg 10061). No comments were received as a result of that notice.

The department's review of 1 Texas Administrative Code Chapter 211 is concluded.

TRD-201100602
Martin Zelinsky
Interim General Counsel
Department of Information Resources
Filed: February 14, 2011

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The Texas Department of Information Resources (department) has completed its review of 1 Texas Administrative Code Chapter 216, relating to Project Management Practices, pursuant to §2001.039, Texas Government Code, which requires agency rules to be reviewed at least every four years. The department determined that the reasons for initially adopting 1 Texas Administrative Code Chapter 216 continue to exist. The department, therefore, is readopting Chapter 216, concerning Project Management Practices.

Notice of the rule review was published in the November 12, 2010, issue of the *Texas Register* (35 TexReg 10061). No comments were received as a result of that notice.

The department's review of 1 Texas Administrative Code Chapter 216 is concluded.

TRD-201100603
Martin Zelinsky
Interim General Counsel
Department of Information Resources
Filed: February 14, 2011

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Texas Optometry Board

Title 22, Part 14

The Texas Optometry Board readopts without change the following rules contained in 22 TAC Chapter 271, Examinations, after reviewing the rules and finding that the reasons for initially adopting the rules continue to exist: §271.1, Definitions; §271.2, Applications; §271.3, Jurisprudence Examination Administration; §271.5, Licensure without Examination; §271.6, National Board Examination; and §271.7, Criminal History Evaluation Letters.

The proposed rule review was published in the December 3, 2010, issue of the *Texas Register* (35 TexReg 10773).

No comments were received.

The rule review was conducted pursuant to Texas Government Code §2001.039. This concludes the review of rules in 22 TAC Chapter 271.

TRD-201100549
Chris Kloeris
Executive Director
Texas Optometry Board
Filed: February 11, 2011

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The Texas Optometry Board readopts without change the following rules contained in 22 TAC Chapter 272, Administration, after reviewing the rules and finding that the reasons for initially adopting the rules continue to exist: §272.1, Open Records; §272.2, Historically Underutilized Business; and §272.3, Bid and Purchasing Protest Procedures.

The proposed rule review was published in the December 3, 2010, issue of the *Texas Register* (35 TexReg 10773).

No comments were received.

The rule review was conducted pursuant to Texas Government Code §2001.039. This concludes the review of rules in 22 TAC Chapter 272.

TRD-201100550
Chris Kloeris
Executive Director
Texas Optometry Board
Filed: February 11, 2011

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The Texas Optometry Board readopts without change the following rules contained in 22 TAC Chapter 273, General Rules, after reviewing the rules and finding that the reasons for initially adopting the rules continue to exist: §273.1, Surrender of License; §273.2, Use of Name of Retired or Deceased Optometrist; §273.3, Contact Lenses as Prize or Premium; §273.4, Fees (Not Refundable); §273.5, Limited License for Clinical Faculty; §273.6, Provisional License; §273.7, Inactive Licenses and Retired License for Volunteer Charity Care; §273.8, Renewal of License; §273.9, Public Interest Information; §273.10, Licensee Compliance with Payment Obligations; §273.11, Public Participation in Meetings; §273.12, Profile Information; and §273.13, Contract or Employment with Community Health Centers.

The proposed rule review was published in the December 3, 2010, issue of the *Texas Register* (35 TexReg 10773).

No comments were received.

The rule review was conducted pursuant to Texas Government Code §2001.039. This concludes the review of rules in 22 TAC Chapter 273.

TRD-201100551
Chris Kloeris
Executive Director
Texas Optometry Board
Filed: February 11, 2011

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The Texas Optometry Board readopts without change the following rules contained in 22 TAC Chapter 275, Continuing Education, after reviewing the rules and finding that the reasons for initially adopting the rules continue to exist: §275.1, General Requirements; and §275.2, Required Education.

The proposed rule review was published in the December 3, 2010, issue of the *Texas Register* (35 TexReg 10773).

No comments were received.

The rule review was conducted pursuant to Texas Government Code §2001.039. This concludes the review of rules in 22 TAC Chapter 275.

TRD-201100552
Chris Kloeris
Executive Director
Texas Optometry Board
Filed: February 11, 2011

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Texas Water Development Board

Title 31, Part 10

Pursuant to the notice of proposed rule review published in the December 31, 2010, issue of the *Texas Register* (35 TexReg 11967), the Texas Water Development Board (board) has reviewed and considered for readoption, revision, or repeal Title 31, Texas Administrative Code, Part 10, Chapter 360, Designation of River and Coastal Basins, in accordance with Texas Government Code §2001.039.

The board considered, among other things, whether the reasons for adoption of these rules continue to exist. No comments were received on the proposed rule review.

As a result of the rule review, the board determined that the reasons for initially adopting the rules in Chapter 360 continue to exist and readopts the rules. This completes the board's review of Chapter 360, Designation of River and Coastal Basins.

TRD-201100616
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: February 15, 2011

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 30 TAC §116.12(18)(A)

TABLE I

MAJOR SOURCE/MAJOR MODIFICATION EMISSION THRESHOLDS

POLLUTANT designation[1]	MAJOR SOURCE tons/year	SIGNIFICANT LEVEL[2] tons/year	OFFSET RATIO minimum
OZONE (VOC, NO_X)[3]			
I marginal	100	40	1.10 to 1
II moderate	100	40	1.15 to 1
III serious	50	25	1.20 to 1
IV severe	25	25	1.30 to 1
CO			
I moderate	100	100	1.00 to 1[4]
II serious	50	50	1.00 to 1[4]
SO_2	100	40	1.00 to 1[4]
PM_{10}			
I moderate	100	15	1.00 to 1[4]
II serious	70	15	1.00 to 1[4]
NO_x[5]	100	40	1.00 to 1[4]
Lead	100	0.6	1.00 to 1[4]

[1] Texas nonattainment area designations as defined in §101.1(70) of this title.

[2] The significant level is applicable only to existing major sources and shall be evaluated after netting, unless the applicant chooses to apply nonattainment new source review (NNSR) directly to the project. The appropriate netting triggers for existing major sources of NO_X and VOC are specified in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) and for other pollutants are equal to the significant level listed in this table.

[3] VOC and NO_X are precursors to ozone formation and should be quantified individually to determine whether a source is subject to NNSR under §116.150 of this title.

[4] The offset ratio is specified to be greater than 1.00 to 1.

VOC = volatile organic compounds

NO_X = oxides of nitrogen

NO_2 = nitrogen dioxide

CO = carbon monoxide

SO_2 = sulfur dioxide

PM_{10} = particulate matter with an aerodynamic diameter less than or equal to ten microns

[5] Applies to the NAAQS for nitrogen dioxide (NO_2).

Figure: 31 TAC §57.981(b)(4)

Species	Daily Bag	Minimum Length (Inches)	Maximum Length (Inches)
Amberjack, greater.	1	34	No limit
Bass: Largemouth, smallmouth, spotted and Guadalupe bass.	5 (in any combination)		
Largemouth and Smallmouth bass.		14	No limit
Bass, striped, its hybrids, and subspecies.	5 (in any combination)	18	No limit
Bass, white.	25	10	No limit
Catfish: channel and blue catfish, their hybrids, and subspecies.	25 (in any combination)	12	No limit
Catfish, flathead.	5	18	No limit
Catfish, gafftopsail.	No limit	14	No limit
Cobia.	2	37	No limit
Crappie: white and black crappie, their hybrids, and subspecies.	25 (in any combination)	10	No limit
Drum, black.	5	14	30*
*Special Regulation: One black drum over 52 inches may be retained per day as part of the five-fish bag limit.			

Drum, red.	3*	20	28*
*Special Regulation: During a license year, one red drum over the stated maximum length limit may be retained when affixed with a properly executed Red Drum Tag, a properly executed Exempt Red Drum Tag or with a properly executed Duplicate Exempt Red Drum Tag and one red drum over the stated maximum length limit may be retained when affixed with a properly executed Bonus Red Drum Tag. Any fish retained under authority of a Red Drum Tag, an Exempt Red Drum Tag, a Duplicate Exempt Red Drum Tag, or a Bonus Red Drum Tag may be retained in addition to the daily bag and possession limit as stated in this section.			
Flounder: all species, their hybrids, and subspecies.	5*	14	No limit
*Special Regulation: During the month of November, lawful means are restricted to pole-and-line only and the bag and possession limit for flounder is two.			
Gar, alligator.*	1	No limit	No limit
*Special Regulation: Between May 1 and May 31 no person shall take alligator gar in that portion of Lake Texoma encompassed within the boundaries of the Hagerman National Wildlife Refuge or that portion of Lake Texoma from the U.S. 377 bridge (Willis Bridge) upstream to the IH 35 bridge.			
Grouper, gag.	2	22	No limit
Grouper, goliath.	0		
Mackerel, king.	2	27	No limit
Mackerel, Spanish.	15	14	No limit
Marlin, blue.	No limit	131	No limit
Marlin, white.	No limit	86	No limit
Mullet: all species, their hybrids, and subspecies.	No limit	No limit	*
*Special Regulation: During the period October through January, no mullet more than 12 inches in length may be taken from public waters or possessed on board a vessel.			
Sailfish.	No limit	84	No limit
Saugeye.	3	18	No limit

Shark: all species, their hybrids, and subspecies other than Atlantic sharpnose, blacktip, and bonnethead sharks.	1	64*	No limit
Atlantic sharpnose, blacktip, and bonnethead sharks.	1	24	No limit
*Special Regulation: The take of the following species of sharks from the waters of this state is prohibited and they may not be possessed on board a vessel at any time: Atlantic angel, Basking, Bigeye sand tiger, Bigeye sixgill, Bigeye thresher, Bignose, Caribbean reef, Caribbean sharpnose, Dusky, Galapagos, Longfin mako, Narrowtooth, Night, Sandbar, Sand tiger, Sevengill, Silky, Sixgill, Smalltail, Whale, and White.			
Sheepshead.	5	15	No limit
Snapper, lane.	No limit	8	No limit
Snapper, red.	4*	15	No limit
*Special Regulation: Red snapper may be taken using pole and line, but it is unlawful to use any kind of hook other than a circle hook baited with natural bait.			
Snapper, vermilion.	No limit	10	No limit
Snook.	1	24	28
Tarpon.	1	85	No limit
Triggerfish, gray.	20	16	No limit
Trout: rainbow and brown trout, their hybrids, and subspecies.	5 (in any combination)	No limit	No limit
Tripletail.	3	17	No limit
Walleye.	5*	No limit	No limit
*Special Regulation: Two walleye of less than 16 inches may be retained per day.			

Figure: 31 TAC §57.981(c)(1)

Species and Location (County)	Daily Bag	Minimum Length (Inches)	Special Regulation
Bass: largemouth, smallmouth, spotted and Guadalupe bass, their hybrids, and subspecies.			
In all waters in the Lost Maples State Natural Area (Bandera).	0	No limit	Catch and release only.
Bass: largemouth and spotted.			
Lakes Alan Henry.	5	No limit	It is unlawful to retain more than two bass of less than 18 inches in length.
Caddo Lake (Marion and Harrison).	8 (in any combination with spotted bass)	14 - 18 inch Slot limit	It is unlawful to retain bass between 14 and 18 inches. No more than 4 largemouth bass 18 inches or longer may be retained. Possession limit is 10.
Sabine River (Newton and Orange) from Toledo Bend dam to I.H. 10 bridge and Toledo Bend Reservoir (Newton, Sabine, and Shelby).	8 (in any combination with spotted bass)	14 (largemouth bass); no limit for spotted bass.	Possession limit is 10.
Bass: largemouth.			
Conroe (Montgomery and Walker), Fort Phantom Hill (Jones), Granbury (Hood), Possum Kingdom (Palo Pinto, Stephens, Young), Proctor (Comanche), and Ratcliff (Houston).	5	16	

Lake Nacogdoches (Nacogdoches).	5		It is unlawful to retain largemouth bass of 16 inches or greater in length. Largemouth bass 24 inches or greater in length may be retained in a live well or other aerated holding device for purposes of weighing, but may not be removed from the immediate vicinity of the lake. After weighing, the bass must be released immediately back into the lake unless the department has instructed that the bass be kept for donation to the ShareLunker Program.
Lakes Aquilla (Hill) , Bellwood (Smith), Braunig (Bexar), Bright (Williamson), Brushy Creek (Williamson), Bryan (Brazos), Calaveras (Bexar), Casa Blanca (Webb), Cleburne State Park (Johnson), Cooper (Delta and Hopkins), Fairfield (Freestone), Gilmer (Upshur), Jacksonville (Cherokee), Marine Creek Reservoir (Tarrant), Meridian State Park (Bosque), Old Mount Pleasant City (Titus), Pflugerville (Travis), Rusk State Park (Cherokee), and Welsh (Titus).	5	18	
Nelson Park Lake (Taylor) and Buck Lake (Kimble).	0	No limit	Catch and release and only.
O.H. Ivie Reservoir (Coleman, Concho, and Runnels).	5	No limit	It is unlawful to retain more than two bass of less than 18 inches in length.

Purtis Creek State Park Lake (Henderson and Van Zandt), and Raven (Walker).	0	No limit	Catch and release only except that any bass 24 inches or greater in length may be retained in a live well or other aerated holding device for purposes of weighing, but may not be removed from the immediate vicinity of the lake. After weighing, the bass must be released immediately back into the lake unless the department has instructed that the bass be kept for donation to the ShareLunker Program.
Lakes Bridgeport (Jack and Wise), Burke-Crenshaw (Harris), Davy Crockett (Fannin), Grapevine (Denton and Tarrant), Georgetown (Williamson), Madisonville (Madison), San Augustine City (San Augustine), and Sweetwater (Nolan).	5	14 - 18 inch Slot limit	It is unlawful to retain largemouth bass between 14 and 18 inches in length.
Lakes Athens (Henderson), Bastrop (Bastrop), Buescher State Park (Bastrop), Houston County (Houston), Joe Pool (Dallas, Ellis, and Tarrant), Kyle (Hays), Mill Creek (Van Zandt), Murvaul (Panola), Pinkston (Shelby), Timpson (Shelby), Town (Travis), Walter E. Long (Travis) and Wheeler Branch (Somervell).	5	14 - 21 inch Slot limit	It is unlawful to retain largemouth bass between 14 and 21 inches in length. No more than 1 bass 21 inches or greater in length may be retained each day.

Lakes Fayette County (Fayette), Gibbons Creek Reservoir (Grimes), and Monticello (Titus).	5	14 - 24 inch Slot limit	It is unlawful to retain largemouth bass between 14 and 24 inches in length. No more than 1 bass 24 inches or greater in length may be retained each day.
Lake Fork (Wood, Rains and Hopkins).	5	16 - 24 inch Slot limit	It is unlawful to retain largemouth bass between 16 and 24 inches in length. No more than 1 bass 24 inches or greater in length may be retained each day.
Bass: smallmouth.			
Lakes O. H. Ivie (Coleman, Concho, and Runnels), Devil's River (Val Verde) from State Highway 163 bridge crossing near Juno downstream to Dolan Falls and Wheeler Branch (Somervell).	3	18	
Lake Meredith (Hutchinson, Moore, and Potter).	3	12 - 15 inch Slot limit	It is unlawful to retain smallmouth bass between 12 and 15 inches in length.
Bass: striped and white bass, their hybrids, and subspecies.			
Sabine River (Newton and Orange) from Toledo Bend dam to I.H. 10 bridge and Toledo Bend Reservoir (Newton, Sabine, and Shelby).	5	No limit	No more than 2 striped bass 30 inches or greater in length may be retained each day.
Lake Texoma (Cooke and Grayson).	10 (in any combination)	No limit	No more than 2 striped or hybrid striped bass 20 inches or greater in length may be retained each day. Striped or hybrid striped bass caught and placed on a stringer, in a live well or any other holding device become part of the daily bag limit and may not be released. Possession limit is 20.

Red River (Grayson) from Denison Dam downstream to and including Shawnee Creek (Grayson).	5 (in any combination)	No limit	Striped bass caught and placed on a stringer, in a live well or any other holding device become part of the daily bag limit and may not be released.
Lake Possum Kingdom (Palo Pinto, Stephens, Young) and Trinity River (Polk and San Jacinto) from the Lake Livingston dam downstream to the F.M. Road 3278 bridge.	2 (in any combination)	18	
Bass: white.			
Lakes Caddo (Harrison and Marion), Texoma (Cooke and Grayson) and Toledo Bend (Newton, Sabine, and Shelby), and Sabine River (Newton and Orange) from Toledo Bend dam to I.H. 10 bridge.	25	No limit	
Carp: common.			
Lady Bird Lake (Travis).	No limit	No limit	It is unlawful to retain more than one common carp of 33 inches or longer per day.
Catfish: blue.			
Lakes Lewisville (Denton), Richland-Chambers (Freestone and Navarro), and Waco (McLennan).	25 (in any combination with channel catfish)	30-45-inch slot limit	It is unlawful to retain blue catfish between 30 and 45 inches in length. No more than one blue catfish 45 inches or greater in length may be retained each day.
Catfish: channel and blue catfish, their hybrids, and subspecies.			
Lake Livingston (Polk, San Jacinto, Trinity, and Walker).	50 (in any combination)	12	

Trinity River (Polk and San Jacinto) from the Lake Livingston dam downstream to the F.M. Road 3278 bridge.	10 (in any combination)	12	No more than 2 channel or blue catfish 24 inches or greater in length may be retained each day.
Lakes Caddo (Harrison and Marion), Kirby (Taylor), Palestine (Cherokee, Anderson, Henderson, and Smith), and Toledo Bend (Newton, Sabine, and Shelby), Sabine River (Newton and Orange) from Toledo Bend dam to I.H. 10 bridge.	50 (in any combination)	No Limit	No more than five catfish 20 inches or greater in length may be retained each day. Possession limit is 50.
Lake Texoma (Cooke and Grayson).	15 (in any combination)	12	No more than one blue catfish 30 inches or greater in length may be retained each day.
North Concho River (Tom Green) from O.C. Fisher Dam to Bell Street Dam, South Concho River (Tom Green) from Lone Wolf Dam to Bell Street Dam.	5 (in any combination)	No limit	
Community fishing lakes.	5 (in any combination)	No limit	
Bellwood (Smith), Dixieland (Cameron), and Tankersley (Titus).	5 (in any combination)	12	
Catfish: flathead.			
Lake Texoma (Cooke and Grayson) and the Red River (Grayson) from Denison Dam to and including Shawnee Creek (Grayson).	5	20	

Lakes Caddo (Harrison and Marion), Toledo Bend (Newton, Sabine, and Shelby), and Sabine River (Newton and Orange) from Toledo Bend dam to the I.H. 10 bridge.	10	18	Possession limit is 10.
Crappie: black and white crappie, their hybrids and subspecies.			
Caddo Lake (Harrison and Marion), Toledo Bend Reservoir (Newton, Sabine, and Shelby), and Sabine River (Newton and Orange) from Toledo Bend dam to the I.H. 10 bridge.	25 (in any combination)	No limit	
Lake Fork (Wood, Rains, and Hopkins) and Lake O' The Pines (Camp, Harrison, Marion, Morris, and Upshur).	25 (in any combination)	10	From December 1, through the last day in February, there is no minimum length limit. All crappie caught during this period must be retained.
Lake Texoma (Cooke and Grayson).	37 (in any combination)	10	Possession limit is 50.
Drum, red.			
Lakes Braunig and Calaveras (Bexar), Coleto Creek Reservoir (Goliad and Victoria), Fairfield (Freestone), and Tradinghouse Creek (McLennan).	3	20	No maximum length limit.
Shad, gizzard and threadfin.			
The Trinity River below Lake Livingston in Polk and San Jacinto Counties.	500 (in any combination)	No limit	Possession limit 1,000 in any combination.

Trout: rainbow and brown trout, their hybrids, and subspecies.			
Guadalupe River (Comal) from the second bridge crossing on the River Road upstream to the easternmost bridge crossing on F.M. Road 306.	1	18	
Walleye.			
Lake Texoma (Cooke and Grayson).	5	18	

Figure: 31 TAC §57.992(b)(4)

Species and Location	Daily Bag	Minimum Length (Inches)	Maximum Length (Inches)
Amberjack, greater.	1	34	No limit
Catfish: channel and blue catfish, their hybrids, and subspecies.	25 (in any combination)*	14	No limit
*Special Regulation: In Lake Livingston (Polk, San Jacinto, Trinity, and Walker counties), the daily bag limit for channel and blue catfish is 50 in any combination. In lakes lying totally within a state park and community fishing lakes, the daily bag limit for channel and blue catfish is five in any combination.			
Catfish, gafftopsail.	No limit	14	No limit
Cobia.	2	37	No limit
Drum, black.	5	14	30*
*Special Regulations: The bag and possession limits for black drum do not apply to the holder of a valid Commercial Finfish Fisherman's License.			
Flounder: all species, their hybrids, and subspecies.	30*	14	No limit
*Special Regulation: The daily bag and possession limit for the holder of a valid Commercial Finfish Fisherman's license is 30 flounder, except on board a licensed commercial shrimp boat. During the month of November, lawful means are restricted to pole-and-line only and the bag and possession limit for flounder is two.			
Gar, alligator.*	1	No limit	No limit
*Special Regulation: Between May 1 and May 31 no person shall take alligator gar in that portion of Lake Texoma encompassed within the boundaries of the Hagerman National Wildlife Refuge or that portion of Lake Texoma from the U.S. 377 bridge (Willis Bridge) upstream to the IH 35 bridge.			
Grouper, gag.	2	22	No limit
Grouper, goliath.	0		
Mackerel, king.	2	27	No limit
Mackerel, Spanish.	15	14	No limit

Mullet: all species, their hybrids, and subspecies.	No limit	No limit	*
*Special regulation: During the period October through January, no mullet more than 12 inches in length may be taken from public waters or possessed on board a vessel.			
Shad: gizzard and threadfin.	No limit	No limit	No limit*
*In the Trinity River below Lake Livingston in Polk and San Jacinto counties, the daily bag for shad is 500 and the possession limit is 1,000 fish in any combination.			
Shark: all species, their hybrids, and subspecies other than Atlantic sharpnose, blacktip, and bonnethead sharks.	1	64*	No limit
Atlantic sharpnose, blacktip, and bonnethead sharks.	1	24	No limit
*Special Regulation: The take of the following species of sharks from the waters of this state is prohibited and they may not be possessed on board a vessel at any time: Atlantic angel, Basking, Bigeye sand tiger, Bigeye sixgill, Bigeye thresher, Bignose, Caribbean reef, Caribbean sharpnose, Dusky, Galapagos, Longfin mako, Narrowtooth, Night, Sandbar, Sand tiger, Sevengill, Silky, Sixgill, Smalltail, Whale, and White.			
Sheepshead.	5*	15*	No limit
*Special Regulation: The bag and possession limits for black drum and sheepshead do not apply to the holder of a valid Commercial Finfish Fisherman's License.			
Snapper, lane.	No limit	8	No limit
Snapper, red.	4*	15	No limit
*Special Regulation: Red snapper may be taken using pole and line, but it is unlawful to use any kind of hook other than a circle hook baited with natural bait.			
Snapper, vermilion.	No limit	10	No limit
Triggerfish, gray.	20	16	No limit
Tripletail.	3	17	No limit

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

Notice of Public Comment on 2011 Texas Foundations Fund Guidelines

The Texas State Affordable Housing Corporation (Corporation) presents for public comment its 2011 Texas Foundations Fund Guidelines. A copy of the 2011 Texas Foundations Fund Guidelines may be found on the Corporation's website at www.tsahc.org. The public comment period for the Corporation's 2011 Texas Foundations Fund Guidelines is Friday, February 11, 2011 through Friday, March 4, 2011.

Written comment may be sent to Paige McGilloway, Single Family Programs Manager, 2200 East Martin Luther King Jr. Boulevard, Austin, Texas 78702 or by e-mail at pmcgilloway@tsahc.org.

TRD-201100547
David Long
President
Texas State Affordable Housing Corporation
Filed: February 11, 2011

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of January 27, 2011, through February 3, 2011. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on February 16, 2011. The public comment period for this project will close at 5:00 p.m. on March 18, 2011.

FEDERAL AGENCY ACTIONS:

Applicant: Robert Crawley; Location: The project is located in Burnet Bay, at 426 South Burnet Drive, in Baytown, Harris County, Texas. The project site can be located on the U.S.G.S. quadrangle map titled: Highlands, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 302418.97; Northing: 3294436.42. Project Description: The applicant proposes to retain a structure (single family dwelling). The house was constructed on Burnet Bay in 2009. The house includes a double boat lift, fishing dock, and living quarters on the upper floor. An after-the-fact permit for the unauthorized structure is being sought by the applicant. CMP Project No.: 11-0200-F1. Type of Application: U.S.A.C.E. permit application #SWG-2010-00277 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: City of Aransas Pass; Location: The project is located in what is presently known as Conn Brown Harbor, adjacent to State Highway 361 in Aransas Pass, Aransas County, Texas. The site of the proposed work within the harbor is at the south end of Bigelow Street within the harbor complex. The project can be located on the U.S.G.S. quadrangle map entitled: Aransas Pass, TX. Approximate (NAD 83) UTM Coordinates: Zone 14; Easting: 683293; Northing: 3087537. Project Description: The applicant proposes to amend Department of the Army (DA) Permit SWG-2004-00003 (previously known as DA Permit No.23284). DA Permit 23284 was issued 10 March 2005 and authorized the redevelopment of the existing Conn Brown Harbor including bulkhead repair, new bulkhead construction, floating docks for recreational craft, overwater deck structures, retail development, marine support services, infrastructure improvement, public boat ramp and waterfront access improvements, and harbor cleanup. CMP Project No.: 11-0201-F1. Type of Application: U.S.A.C.E. permit application #SWG-2004-00003 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Kiewit Offshore Services, Ltd.; Location: The project is located in the La Quinta Channel, in Corpus Christi Bay, from a point adjacent to the Kiewit facility to the point where the La Quinta Channel intersects with the Corpus Christi Ship Channel, in Nueces and San Patricio Counties, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Ingleside, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 14; Easting: 673750; Northing: 3081190. Project Description: The applicant is requesting to amend Department of the Army Permit No. SWG-2001-02106 (formerly known as 22302). The amendment request involves additional widening of the La Quinta Channel to accommodate the transit of several large production and drilling platforms that have a maximum beam width of approximately 390 feet. The applicant is proposing to widen the channel by 30 feet, from the existing 400 feet to 430 feet, between the Kiewit facility and the junction with the Corpus Christi Ship Channel. No changes to channel depth are proposed. The applicant would hydraulically dredge and/or mechanically excavate approximately 550,000 cubic yards of sandy clay material and place them in any of three authorized placement areas; Dredge Material Placement Area No. 13, Berry Island, or the placement area on Kiewit's existing facility. The footprint of the dredged area would be 30 additional feet in width on the northeast edge of the La Quinta Channel between stations 175+00 and 90+00 (Kiewit facility to just south of Berry Island) and then and additional 30 feet wide on the southeast edge of La Quinta Channel from Stations 90+00 to 30+00 (south of Berry Island to the intersection with Corpus Christi Ship Channel). This configuration would result in unavoidable impacts to approximately 711 square feet of submerged aquatic vegetation. The applicant has stated that they will coordinate with the pilots and the Port of Corpus Christi to ensure that impacts to safe and timely navigation do not occur during construction. Additionally, two pile supported aids to navigation will need to be relocated as a result of this project. CMP Project No.: 11-0246-F1. Type of Application: U.S.A.C.E. permit application #SWG-2001-02106 is

being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action or activity is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy of the consistency certifications or consistency determinations for inspection may be obtained from Ms. Kate Zultner, Consistency Review Specialist, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or via email at kate.zultner@glo.texas.gov. Comments should be sent to Ms. Zultner at the above address or by email.

TRD-201100582

Larry L. Laine

Chief Clerk/Deputy Land Commissioner, General Land Office

Coastal Coordination Council

Filed: February 14, 2011

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Comptroller of Public Accounts

Notice of Request for Proposals

Pursuant to Chapter 54, Subchapters F, G and H, Texas Education Code, the Comptroller of Public Accounts (Comptroller), on behalf of the Texas Prepaid Higher Education Tuition Board (Board), issues this Request for Letter Proposals (RFP No. 201g) from qualified, independent individuals and law firms to serve as outside counsel to the Board. The Board administers the state's prepaid higher education tuition program, known as the Texas Guaranteed Tuition Plan (TTF I); the state's higher education savings plans, known as the LoneStar 529 Plan and the Texas College Savings Plan; the Texas Tuition Promise Fund, the state's prepaid unit tuition plan (TTF II); and the Texas Match the Promise Fund (TMPF), an IRC 501(c)(3) foundation (Funds). The Funds are qualified programs authorized under Section 529 and/or 501(c)(3) of the Internal Revenue Code. Under the terms of this RFP, the Board intends to select qualified counsel to provide the Board with legal services on an as-needed, as-requested basis in a variety of matters requiring expertise in federal taxation, corporate, contracts, securities, finance, family, intellectual property rights, and administrative law. The Board estimates that it will evaluate respondents and announce a contract award or awards no later than May 31, 2011, or as soon thereafter as practical. Clark, Thomas & Winters, P.C., currently serves as legal counsel to the Board, and its contract with the Board expires on August 31, 2011. Respondents must be able to begin providing services on an as-needed basis as soon as possible or no later than about May 31, 2011, and throughout the expected initial contract term - May 31, 2011 through August 31, 2012 with two (2) options to renew at the Board's sole discretion, for one (1) year periods, exercised one (1) year at a time.

Questions and Proposed Contract: Questions concerning this RFP and requests for copies of the proposed sample contract must be in writing and submitted via hand delivery or facsimile no later than Friday, March 4, 2011, 2:00 p.m., Central Standard Time (CT) to William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., Room 201, Austin, Texas 78774 (Issuing Office), telephone number: (512) 305-8673, facsimile (512) 463-3669. The sample contract will be available upon request. The Comptroller's official response to questions received by the above deadline will be posted as an addendum to the Electronic State Business Daily (ESBD) notice on Friday, March 11, 2011, or as soon thereafter as practical.

Closing Date: An original and ten (10) copies of each Letter Proposal must be delivered to and received in the Office of the Assistant General Counsel, Contracts, at the address specified above no later than 2:00 p.m. (CT), on Friday, March 25, 2011. Proposals received after this date and time will not be considered. Respondents shall be solely responsible for confirming the timely receipt of proposals in the Issuing Office by the deadline; late proposals will not be considered. Content: Letter Proposals must include all of the following information in order to be considered:

1. Transmittal letter that (a) describes specific experience and qualifications of both the Law Firm and each proposed partner and associate in each of the requisite areas of practice, particularly highlighting recent experience in representing governmental entities in similar matters involving qualified college tuition and savings programs and 501(c)(3) foundations; (b) outlines the Law Firm's understanding of the Board's enabling legislation, administrative rules, and related law, including Chapter 54, subchapters F, G and H, Texas Education Code; Title 34, Chapter 7, Texas Administrative Code; and Section 529, Internal Revenue Code; (c) details the Law Firm's ability to attend and make presentations at Board meetings and meetings with the Comptroller's staff in Austin, Texas; and (d) describes the Law Firm's ability to quickly respond to Board requests for research and legal advice with regard to the varied areas of law detailed in the first paragraph of this RFP.

2. Physical address of Law Firm's Texas offices, if any, and the physical address of the Law Firm's office that will have primary responsibility for any contract resulting from this RFP;

3. Vita for each proposed partner and associate who will provide services under the contract, if the Board makes a contract award under this RFP;

4. Proposed hourly rates for each proposed partner and associate and statements as to (a) whether proposed fees are negotiable; (b) how proposed fees compare to recently contracted fees with other governmental entities on similar matters, if any; (c), proposed reimbursement basis for out-of-pocket expenses other than travel; and (d) whether proposed fees are firm throughout the expected contract term (for the initial contract term May 31, 2011 through August 31, 2012, and for each potential option renewal year);

5. Proposed mechanisms to control and communicate total costs such as providing the Board with estimates of billable costs prior to beginning specific assignments and timely advising the Board when additional work is required to complete those assignments;

6. Disclosures of actual and potential conflicts of interest, if any, including but not limited to, identifying each and every matter in which the Law Firm has, within the past calendar year, represented any entity or individual with an interest adverse to the Comptroller, the Board or to the State of Texas, or any of its boards, agencies, commissions, universities or elected or appointed officials;

7. Information regarding efforts made by the Law Firm to encourage and develop the participation of minorities and women in the provision of services such as those requested; and

8. Confirmation of willingness to comply with the policies, directives and guidelines of the Board and the Comptroller.

Evaluation and Award Procedure: All qualifying Letter Proposals received by the above deadline will be evaluated based on qualifications, experience and reasonableness of contracted fees. The Board will make the final selection in its sole discretion in the best interests of the Funds and the State of Texas. Notice of contract award will be published on

the Electronic State Business Daily (ESBD) and in the *Texas Register* as soon as possible after contract signature, if a contract is awarded under this RFP.

Limitations: The Board reserves the right to accept or reject any or all Letter Proposals submitted in response to this RFP. The Board is not obligated to make any award or execute any contract as a result of issuing this RFP. The Board shall pay no costs or any other amounts incurred by any entity in responding to this RFP. The selected Law Firm's sole compensation shall be limited to contracted amounts in the final negotiated contract; no minimum amount of work is guaranteed. No travel expenses or travel reimbursement will be paid. The Comptroller and the Board may solicit or select other legal counsel to provide the same or similar services at any time.

Summary of Schedule: The anticipated schedule is as follows: Issuance of RFP - Friday, February 25, 2011, after 10:00 a.m. CT; Questions and Request for Copies of Sample Contract Due - Friday, March 4, 2011, 2:00 p.m. CT; Electronic Posting of Official Response to Questions posted - Friday, March 11, 2011, or as soon thereafter as practical; Proposals Due - Friday, March 25, 2011, 2:00 p.m. CT; Contract Execution and initiation of transition, if any - May 31, 2011, or as soon thereafter as practical; Contract Effective - May 31, 2011, or as soon thereafter as practical.

TRD-201100627
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: February 16, 2011

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 02/21/11 - 02/27/11 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 02/21/11 - 02/27/11 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-201100618
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 15, 2011

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Credit Union Department

Application for a Merger or Consolidation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application was received from Sears Waco Credit Union (Waco) seeking approval to merge with First Central Credit Union (Waco), with the latter being the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201100629
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 16, 2011

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Application to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department (Department) and are under consideration:

An application was received from Cabot & NOI Employees Credit Union, Pampa, Texas, to expand its field of membership. The proposal would permit employees of Engine Parts & Supply, 416 West Foster Avenue, Pampa, Texas 79065, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201100628
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 16, 2011

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Application to Expand Field of Membership - Approved

Neighborhood Credit Union, Dallas, Texas - See *Texas Register* issue, dated June 25, 2010.

First Central Credit Union (#1), Waco, Texas (Amended) - Members of Friends of Consumer Freedom who live, work, worship or attend school in Callahan, Eastland, Comanche, Mills, San Saba, McCulloch, and Coleman Counties, Texas.

First Central Credit Union (#2), Waco, Texas (Amended) - Members of Friends of Consumer Freedom who live, work, worship or attend school in Bosque, Falls, and Coryell Counties, Texas.

Reed Credit Union, Houston, Texas - See *Texas Register* issue, dated November 26, 2010.

YOUR Community Credit Union, Irving, Texas - See *Texas Register* issue, dated November 26, 2010.

Application to Expand Field of Membership - Withdrawn

America's Credit Union, Garland, Texas - See *Texas Register* issue, dated January 28, 2011.

Application to Amend Articles of Incorporation - Approved

Carroll Childers Credit Union, Houston, Texas - See *Texas Register* issue, dated December 31, 2010.

Application for a Merger or Consolidation - Approved

First Service Credit Union (Houston) and Right Choice Credit Union (Houston) - See *Texas Register* issue, dated November 26, 2010.

TRD-201100630
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 16, 2011

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Texas Education Agency

Public Notice Announcing the Availability of the Proposed Texas Individuals with Disabilities Education Improvement Act of 2004 (IDEA) Eligibility Document: State Policies and Procedures

Purpose and Scope of the Part B Federal Fiscal Year (FFY) 2011 State Application and its Relation to Part B of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). As a result of the 2004 amendments to the IDEA, all states must ensure that the state has on file with the Secretary of the U.S. Department of Education assurances that the state meets or will meet all of the eligibility requirements of Part B of the IDEA as amended in 2004 by Public Law 108-446. A state may do this by one of the following methods: (1) providing assurances in the Part B FFY 2011 State Application that it has in effect policies and procedures to meet the requirements of Part B of the IDEA as amended in 2004 by Public Law 108-446; (2) providing assurances in the State Application that the state will operate consistent with all the requirements of Public Law 108-446 and applicable regulations and make such changes to existing policies and procedures as necessary to bring those policies and procedures into compliance with the requirements of IDEA, as amended, as soon as possible and not later than October 31, 2011; or (3) submitting modifications to state policies and procedures previously submitted to the U.S. Department of Education.

The State of Texas (Texas Education Agency) has chosen to submit a 2011 State Application providing assurances the state will operate consistent with all the requirements of Public Law 108-446 and applicable regulations.

Availability of the State Application. The Proposed State Application is available on the Texas Education Agency (TEA) Special Education web page at http://www.tea.state.tx.us/index2.aspx?id=2147493812. The Proposed State Application document may be reviewed and/or downloaded from this web page address. In addition, instructions for submitting public comments are also available from the same site. The Proposed State Application document will also be available at the 20 regional education service centers and at the TEA Library (Ground Floor, Room G-102), William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Parties interested in reviewing the Proposed State Application should contact the TEA Division of IDEA Coordination at (512) 463-9414.

Procedures for Submitting Written Comments About the Proposed State Application. The TEA will accept written comments pertaining to the Proposed State Application by mail to the Texas Education Agency, Division of IDEA Coordination, 1701 North Congress Avenue, Austin, Texas 78701-1494 or by email to sped@tea.state.tx.us.

Timetable for Submitting the Annual State Application Under Part B of the Individuals with Disabilities Education Act as Amended in 2004 for FFY 2011 to the Secretary of Education for Approval. After review and consideration of all public comments, the TEA will make necessary/appropriate modifications and will submit the State Application on or before May 10, 2011.

For more information, contact the TEA Division of IDEA Coordination by mail at 1701 North Congress Avenue, Austin, Texas 78701; by telephone at (512) 463-9414; by fax at (512) 463-9560; or by email at sped@tea.state.tx.us.

TRD-201100635
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 16, 2011

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Request for Reading Diagnostic Instruments

Description. The Texas Education Agency (TEA) is notifying publishers that reading diagnostic instruments for Kindergarten, Grade 1, and Grade 2; Grade 7; and Grades 3, 4, 5, 6, and 8 may be submitted for review for inclusion on the 2011-2012 Commissioner's List of Reading Instruments.

Kindergarten, Grade 1, and Grade 2

Reading diagnostic instruments for Kindergarten, Grade 1, and Grade 2 may be submitted for review. Texas Education Code (TEC), §28.006, authorizes the commissioner of education to develop recommendations for school districts to administer reading instruments to diagnose student reading development and comprehension.

In accordance with the TEC, §28.006(b), the commissioner of education shall adopt a list of reading instruments that school districts may use to diagnose student reading development and comprehension. Reading instruments placed on the list must be based on scientific research, evaluate individual student reading progress, and be used to identify students at risk for dyslexia or other reading difficulties. The list of reading instruments adopted under the TEC, §28.006(b), must also provide for diagnosing the reading development and comprehension of students participating in a program under the TEC, Chapter 29, Subchapter B (Bilingual Education and Special Language Programs).

Program Requirements. Since the 1998-1999 school year, school districts have been required to administer early reading instruments. Results from the reading instruments are used to inform instruction, and support additional support assistance for students struggling to achieve literacy success. Results from these reading instruments must be reported to the commissioner of education, the local school board, and the parent and/or guardian of students tested.

Due to continued budgetary limitations, a cap of $5 per student every four years will remain on each complete Test Option for Kindergarten, Grade 1, and Grade 2 on the 2011-2012 Commissioner's List of Reading Instruments. For the 2011-2012 school year, school districts and open-enrollment charter schools will purchase reading instruments directly from the publisher/vendor and file for reimbursements accordingly. If the cost of the Test Option exceeds the $5 per student limit established, the state will reimburse the school district or open-en-

rollment charter school at the limit established. The school district or open-enrollment charter school is responsible for the remainder of the cost of the Test Option.

Selection Criteria Specific to Reading Diagnostic Instruments for Kindergarten, Grade 1, and Grade 2. Publishers will be responsible for submitting tests they wish to have considered for inclusion on the 2011-2012 Commissioner's List of Reading Instruments. All tests submitted for review must be based on scientific research and must be submitted with evidence of reliability and validity for assessing key reading domains and identifying children at risk of reading failure, including the identification of children with dyslexia. Submitted evidence must demonstrate that the test meets the state criteria for reliability and validity. Instruments will be evaluated in terms of validity, reliability, and ease of administration/implementation by the classroom teacher. Consideration will also be given to the number of domains covered by the test and the number of additional tests that would need to be purchased by schools in order to cover all required domains. Reading instruments (English and Spanish) submitted for review must address at least one of the following five domains: (1) phonological awareness; (2) graphophonemic knowledge; (3) word reading; (4) oral reading accuracy; and (5) comprehension of text, as appropriate for Kindergarten, Grade 1, and Grade 2. As in previous years, it may be necessary to use a combination of instruments to form a Test Option to assess all required domains.

Grade 7

Reading diagnostic instruments for Grade 7 also may be submitted for review. In accordance with the TEC, §28.006(c-1), each school district shall administer at the beginning of Grade 7 a reading instrument adopted by the commissioner to each student whose performance on the assessment instrument in reading administered under the TEC, §39.023(a), to the student in Grade 6 did not demonstrate reading proficiency, as determined by the commissioner. The district shall administer the reading instrument in accordance with the commissioner's recommendations under the TEC, §28.006(a)(1).

Program Requirements. Since the 1998-1999 school year, school districts have been required to administer early reading instruments. Results from the reading instruments are used to inform instruction, and support additional support for students struggling to achieve literacy success. Results from these reading instruments must be reported to the commissioner of education, the local school board, and the parent and/or guardian of students tested.

For the Grade 7 reading diagnostic instrument, school districts and open-enrollment charter schools have the option to use the state-owned Texas Middle School Fluency Assessment (TMSFA). The TMSFA and training on how to administer and interpret results of the instrument are provided through the regional education service centers at no cost to school districts and open-enrollment charter schools. The TMSFA also provides reading instruments for Grades 6 and 8. If school districts or open-enrollment charter schools opt to use a Grade 7 reading instrument other than the TMSFA, they must cover the full cost of the instrument.

For the Grade 7 reading diagnostic instrument, 19 TAC §101.6001, Texas Middle School Diagnostic Reading Assessment, states that an alternate diagnostic reading instrument (an instrument used in place of the TMSFA) must: (1) be based on published scientific research in reading; (2) be age and grade-level appropriate, valid, and reliable; (3) identify specific skill difficulties in word analysis, fluency, and comprehension; and (4) assist the teacher in making individualized instructional decisions based on the assessment results.

Information on how reading instruments will be evaluated can be found in the *Guidelines for the Implementation of TEA Criteria for the Evaluation of English Reading Instruments* section of this notice.

Grades 3, 4, 5, 6, and 8

In order to create a comprehensive list of reading diagnostic instruments from Kindergarten-Grade 8, publishers are also invited to submit reading instruments for Grades 3, 4, 5, 6, and 8. Information on how reading instruments will be evaluated can be found in the *Guidelines for the Implementation of TEA Criteria for the Evaluation of English Reading Instruments* section of this notice. All instruments found to be conforming to the specified guidelines will be published in the 2011-2012 Commissioner's List of Reading Instruments. While school districts and open-enrollment charter schools will not be reimbursed or provided no-cost copies of instruments in Grades 3, 4, 5, 6, and 8, they may refer to the list to ensure that they are selecting instruments that are based on scientific research, valid, and reliable and that measure the appropriate set of reading skills.

2011-2012 Commissioner's List of Reading Instruments. The list of reading instruments will be made available late spring/early summer so that school districts and open-enrollment charter schools may order instruments for the 2011-2012 school year. Instruments selected for the Commissioner's List of Reading Instruments will remain on the list for four years unless the approved instrument is no longer available from the publisher or the publisher submits an updated version of the instrument prior to the end of the four-year approval cycle. Reading instruments approved in earlier years do not need to be resubmitted this year if still within the four-year approval cycle but must be resubmitted when the four-year cycle has expired.

Please note: The allocation of $5 per student every four years is only for Kindergarten, Grade 1, and Grade 2. There is no reimbursement for other grades, but the TEA will include approved instruments on the Commissioner's List of Reading Instruments for the 2011-2012 school year.

Guidelines for the Implementation of TEA Criteria for the Evaluation of English Reading Instruments

1. The instrument must be intended for use in Kindergarten-Grade 8.

2. The length of time needed to administer the instrument, plus other instruments necessary to assess all relevant domains, must be less than 60 minutes per student. That is, total assessment time for evaluation of all relevant skills at each grade level must not exceed 60 minutes.

3. The domains addressed by the instrument must directly assess reading skills, preferably as they are specified in the Texas Essential Knowledge and Skills. Because measurement of early reading skills is desired, instruments that only measure reading-related skills (e.g., book and print awareness) are insufficient as measures of early reading.

4. The instrument should have a scoring structure that yields a separate score for each reading skill included at each grade level. For this review, an instrument is only considered to "assess" a domain if it provides a score for that domain.

5. The instrument must be individually administered. Although technically group-administered assessments may be individually administered, House Bill (HB) 107, 75th Texas Legislature, 1997, specifically mandated assessments intended for individual administration. Thus, tests primarily intended for group administration were not considered to meet the intent of HB 107.

6. Administration of the instrument by a classroom teacher must be allowable. Specifically, the qualifications for those who administer and interpret the instrument (as specified in publisher's guidelines) should be within the coursework and/or licenses typically completed by teach-

ers with education certification. Administration procedures requiring timing, basals, ceilings, complex judgments, and/or subjective ratings require the special training of a diagnostician and may be inappropriate for teacher administration.

7. If the instrument is norm-referenced, it must have an appropriate national norming sample as evidenced by the size of the sample and groups represented. Norm-referenced tests must be representative of the population of students in Kindergarten-Grade 8. Criterion-referenced decisions about criterion mastery, non-mastery, risk, and impairment have special requirements for reliability and validity (see Guidelines 8 and 9).

8. The instrument must have, at a minimum, adequate reliability established by independent research as evidenced by internal consistency, alternate form and/or test-retest reliability data, or must provide suitable psychometric data from the test development process for tests based on Item Response Theory, including, but not limited to, the standard error of measurement, indices of item discrimination and difficulty, and total test information. Classifications resulting from criterion-referenced tests must be shown to be reliable. Instruments that depend on examiner ratings must demonstrate appropriate forms of interrater reliability.

9. Decisions based on test results must be supported by validity evidence established by independent research such as evidence of criterion validity (either concurrent or predictive), construct and content validity data, and discriminant and convergent validity. Studies of test dimensionality (e.g., factor analysis), differential item functioning, or predictive utility involving multiple measures should be provided wherever available. Classifications resulting from criterion-referenced tests must be shown to be valid and must demonstrate both sensitivity and specificity.

10. Normative and technical data for the instrument must be no more than 15 years old.

11. While it is desirable to determine risk of dyslexia and other reading-related difficulties, there exists no single reliable and valid measurement method for determining such risks. According to research in measuring reading disabilities, instruments that measure phonological awareness and single-word decoding may have utility in making judgments about dyslexia and other reading disabilities. Therefore, instruments that include measures of phonological awareness and single-word decoding will be identified, but the validity and utility of using such instruments in identifying disabilities must be the subject of specific follow-up research.

Proposals must be submitted to Dr. Gareth P. Morgan; The University of Texas at Austin; 1 University Station D4900; Austin, Texas 78712 by 5:00 p.m. (Central Time), Friday, March 18, 2011, to be considered for inclusion on the 2011-2012 Commissioner's List of Reading Instruments.

Further Information. For clarifying information, contact the TEA Division of Standards and Alignment at (512) 463-9483.

TRD-201100636
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 16, 2011

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 28, 2011.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 28, 2011.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Alvin Grace; DOCKET NUMBER: 2011-0171-WOC-E; IDENTIFIER: RN106035546; LOCATION: Denton County; TYPE OF FACILITY: RULE VIOLATED: 30 Texas Administrative Code (TAC) §30.5, by failing to obtain a required occupational license and or registration; PENALTY: $210; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Apache Corporation; DOCKET NUMBER: 2010-1354-AIR-E; IDENTIFIER: RN105723282; LOCATION: Wheeler, Wheeler County; TYPE OF FACILITY: natural gas processing; RULE VIOLATED: 30 TAC §§101.201(b), 101.211(b), 106.511, 111.111(a)(4)(A)(ii), 116.615(8), 116.620(a)(11), (c)(3), (e)(4), (6), and (8), and 122.143(4), 40 Code of Federal Regulations (CFR) §63.764(d)(2) and §63.774(f), Texas Health and Safety Code (THSC), §382.085(b), Federal Operating Permit (FOP) Number O-03297, and Site-wide Requirement Numbers (b)(7)(D), (8)(B) and (D), and (27)(F) and (G), by failing to maintain compliance records for the Sidney Plant; 30 TAC §116.620(a)(5) and (b)(2) and THSC, §382.085(b), by failing to route volatile organic compound (VOC) emissions to a control device at the Sidney Plant, 30 TAC §116.615(2), THSC, §382.085(b), and Standard Permit Registration Number 88166, Maximum Allowable Emissions Rates Table, by failing to notify the executive director of an increase in the discharge of the VOC emissions from the glycol dehydrator unit at the Sidney Plant, 30 TAC §116.615(4) and (5), 40 CFR §63.775(c)(1) and (7) and THSC, §382.085(b), by failing to provide notification of the initial construction and start-up activities of the Sidney Plant to the TCEQ Amarillo Regional Office and the United States Environmental Protection Agency prior to the commencement of such activities., 30 TAC §122.143(4), THSC, §382.085(b), and FOP Number O-03297, Site-wide Requirement Numbers (b)(28) and (29), by failing to implement a Compliance Assurance Monitoring (CAM) and a Periodic Monitoring (PM) program at the Sidney Plant; 30 TAC §122.143(4) and §122.145(2)(B), THSC, §382.085(b), and FOP Number O-03297, Site-wide Requirement Number (b)(2), by failing

to submit a semi-annual deviation report; 30 TAC §§101.201(b), 101.211(b), 111.111(a)(4)(A)(ii), 116.615(8), 116.620(a)(11), (c)(3), (e)(4), (6), and (8), and 122.143(4), THSC, §382.085(b), FOP Number O-02964, and Site-wide Requirement Numbers (b)(8)(B) and (D) and (27)(F) and (G), by failing to maintain compliance records for the Stiles Plant; 30 TAC §116.615(4) and (5) and THSC, §382.085(b), by failing to provide notification of the initial construction and start-up activities for the Stiles Plant to the Amarillo Regional Office prior to the commencement of such activities; 30 TAC §122.143(4) and §122.145(2)(A), THSC, §382.085(b), FOP Number O-02964, Site-wide Requirement Number (b)(2), by failing to include all instances of deviations at the Stiles Plant in the deviation reports for each six month period; and 30 TAC §122.143(4), THSC, §382.085(b), FOP Number O-02964, and Site-wide Requirement Numbers (b)(28) and (29), by failing to implement a CAM and a PM program at the Stiles Plant; PENALTY: $107,000; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3423; REGIONAL OFFICE: 3918 Canyon Drive Amarillo, Texas 79109-4933, (806) 353-9251.

(3) COMPANY: Ashiq A. Gokal dba Kwik Stop 10; DOCKET NUMBER: 2010-1825-PST-E; IDENTIFIER: RN101536274; LOCATION: Azle, Tarrant County; TYPE OF FACILITY: property with one active underground storage tank (UST); RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST; and 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: BAILEY BARK MATERIALS, INC.; DOCKET NUMBER: 2010-1370-MLM-E; IDENTIFIER: RN105241756; LOCATION: Nacogdoches, Nacogdoches County; TYPE OF FACILITY: a mulching composting facility; RULE VIOLATED: 30 TAC §§335.6(a), 328.5(b), and 330.11(e)(2), by failing to notify the executive director of recycling operations prior to accepting recyclable materials generated at an industrial facility; PENALTY: $1,040; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(5) COMPANY: C&R Distributing, LLC dba C&R Fuel Control 50; DOCKET NUMBER: 2010-1883-AIR-E; IDENTIFIER: RN102791043; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: gasoline service station; RULE VIOLATED: 30 TAC §114.100(a) and THSC, §382.085(b), by failing to comply with the minimum oxygen content of 2.7% by weight of gasoline; PENALTY: $900; ENFORCEMENT COORDINATOR: Gena Hawkins, (512) 239-2583; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(6) COMPANY: City of Anahuac and Trinity Bay Conservation District; DOCKET NUMBER: 2010-1604-MWD-E; IDENTIFIER: RN102179652; LOCATION: Anahuac, Chambers County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: the Code, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010396001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, by failing to comply with the permitted effluent limitations for ammonia nitrogen (NH_3N); PENALTY: $6,620; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: City of Kilgore; DOCKET NUMBER: 2010-1013-MWD-E; IDENTIFIER: RN102079985; LOCATION: Kilgore, Gregg County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: the Code, §26.121(a)(1), 30 TAC §305.125(1), and TPDES Permit Number WQ0010201001, Interim Effluent Limitations and Monitoring Requirements Numbers 1 and 6 for Outfall 002, by failing to comply with permitted effluent limitations for carbonaceous biochemical oxygen demand (CBOD), flow, dissolved oxygen (DO), and total suspended solids (TSS); and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0010201001, Chronic Biomonitoring Requirements: Freshwater, Number 3.b.3 and 24-Hour Acute Biomonitoring Requirements: Freshwater, Number 3.b.1, by failing to timely submit the discharge monitoring report for whole effluent toxicity at the intervals specified in the permit; PENALTY: $25,704; Supplemental Environmental Project (SEP) offset amount of $20,564 applied to holding two one-day events for the collection, recycling, or proper disposal of residential electronic waste consisting of computers, cell phones, scanners, and televisions; ENFORCEMENT COORDINATOR: Marty Hott, (512) 239-2587; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(8) COMPANY: City of Leona; DOCKET NUMBER: 2010-1946-PWS-E; IDENTIFIER: RN101404002; LOCATION: Leona, Leon County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.41(c)(1)(F), by failing to provide a sanitary control easement covering all land within 150 feet of Well Number 1; 30 TAC §290.42(l) and TCEQ Agreed Order Docket Number 2007-0708-PWS-E, Ordering Provision 2.a.v, by failing to maintain a complete and up-to-date plant operations manual for operator review and reference; and 30 TAC §290.46(n)(3), by failing to provide a copy of well completion data for Well Number 1; PENALTY: $302; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(9) COMPANY: City of Slaton; DOCKET NUMBER: 2010-1993-PWS-E; IDENTIFIER: RN101202604; LOCATION: Slaton, Lubbock County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.46(d)(2)(B) and §290.110(b)(4), by failing to operate the disinfection equipment to continuously maintain a disinfectant residual of 0.5 milligrams per liter (mg/L) chloramine throughout the distribution system at all times, 30 TAC §290.46(d)(2)(B) and §290.110(b)(4), by failing to operate the disinfection equipment to continuously maintain a disinfectant residual of 0.5 mg/L of total chlorine throughout the distribution system at all times; PENALTY: $818; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(10) COMPANY: Country Terrace Water Company, Inc.; DOCKET NUMBER: 2010-1745-UTL-E; IDENTIFIER: RN102675576; LOCATION: Houston, Harris County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.39(o)(1) and §291.162(a) and (j) and the Code, §13.1395(b)(2), by failing to adopt and submit to the executive director for approval by March 1, 2010, an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $388; ENFORCEMENT COORDINATOR: Kelly Wisian, (512) 239-2570; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: CUSA EE, LLC dba El Expreso Bus Company; DOCKET NUMBER: 2010-1666-PST-E; IDENTIFIER: RN101894681; LOCATION: Houston, Harris County; TYPE OF

FACILITY: bus station with USTs; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; and 30 TAC §334.50(b)(1)(A), (d)(1)(B)(ii) and (iii)(I) and the Code, §26.3475(c)(1), by failing to monitor the USTs for releases at a frequency of at least once per month; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: DALLAS R & S INTERNATIONAL INCORPORATED dba Buy Low Fina; DOCKET NUMBER: 2010-1770-PST-E; IDENTIFIER: RN101545689; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months.; PENALTY: $2,451; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Diba Petroleum, Incorporated dba Richardson Square Mart Texaco; DOCKET NUMBER: 2010-1735-PST-E; IDENTIFIER: RN100595974; LOCATION: Richardson, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers, or catchment basins associated with a UST system at least once every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid-tight, and free of liquid and debris; and 30 TAC §115.242(9) and THSC, §382.085(b), by failing to post operating instructions conspicuously on the front of each gasoline dispensing pump equipped with a Stage II vapor recovery system; PENALTY: $7,606; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: Donald H. Sinquefield; DOCKET NUMBER: 2011-0157-WOC-E; IDENTIFIER: RN103830089; LOCATION: Hunt County; TYPE OF FACILITY: occupational licensing; RULE VIOLATED: 30 TAC §30.5, by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Eagle Rock Field Services, L.P.; DOCKET NUMBER: 2010-1473-AIR-E; IDENTIFIER: RN102527397; LOCATION: Skellytown and Lefors, Carson and Gray Counties; TYPE OF FACILITY: natural gas processing plants; RULE VIOLATED: 30 TAC §116.620(c)(1)(F) and §122.143(4), FOP Number O-00532, Site-wide requirements (b)(7)(B), Standard Permit Registration Number 48659, and THSC, §382.085(b), by failing to equip five open-ended lines with a cap, blind flange, plug, or second valve; 30 TAC §116.615(2) and §122.143(4), FOP Number O-00532, Site wide requirements (b)(7)(B), Standard Permit Registration Number 48659, and THSC, §382.085(b), by failing to maintain the carbon monoxide and nitrogen oxides (NO_x) emissions within the permitted annual emissions rates; 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O-00530, Site-wide requirements (b)(2), and THSC, §382.085(b), by failing to submit complete and accurate semi-annual deviation reports; 30 TAC §122.143(4) and §122.146(1), FOP O-00530 Site-wide requirements (b)(2), and THSC, §382.085(b), by failing to certify compliance with the terms and conditions of the permit for at least each 12-month period following initial permit issuance; 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O-00530, Site-wide requirements (b)(2), and THSC, §382.085(b), by failing to submit complete and accurate semi-annual deviation reports; and 30 TAC §122.143(4) and §122.146(1), FOP Number O-00530, Site-wide requirements (b)(2), and THSC, §382.085(b), by failing to certify compliance with the terms and conditions of the permit; PENALTY: $2,808; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6635; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(16) COMPANY: Huntsman Petrochemical LLC; DOCKET NUMBER: 2010-1422-AIR-E; IDENTIFIER: RN100219252; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: Air Permit Number 19823, Special Condition (SC) Numbers 1 and 26, FOP Number O-02288, Special Terms and Conditions (STC) Number 16, 30 TAC §116.115(c) and §122.143(4), and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; SEP offset amount of $4,000 applied to Southeast Texas Regional Planning Commission - Southeast Texas Regional Air Monitoring Network Ambient Air Monitoring Station; ENFORCEMENT COORDINATOR: Todd Huddleson, (512) 239-2541; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(17) COMPANY: J&S Water Company, L.L.C.; DOCKET NUMBER: 2010-1848-UTL-E; IDENTIFIER: RN101181733; LOCATION: Harris County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.39(o)(1) and §291.162(a) and (j) and the Code, §13.1395(b)(2), by failing to adopt and submit to the executive director for approval by the extension due date of June 1, 2010, an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $873; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: KHURSA ENTERPRISES INCORPORATED dba Let's Stop; DOCKET NUMBER: 2010-1521-PST-E; IDENTIFIER: RN101433308; LOCATION: Euless, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for inspection upon request by agency personnel; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment vapor space manifolding, and dynamic back pressure at least once every 36 months or upon major system replacement or modification; 30 TAC §334.50(b)(1)(A), (2)(A) and (i)(III), and (d)(1)(B)(ii) and (iii)(I), and the Code, §26.3475(a) and (c)(1), by failing to ensure that all USTs are monitored in a manner which will detect a release at a frequency of at least once every month; 30 TAC §334.50(b)(2)(A) and the Code, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once each month; 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each oper-

ating day; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube for each regulated UST; 30 TAC §334.42(i), by failing to inspect all sumps including the dispenser sumps, manways, overspill containers, or catchment basins associated with the UST system at least once every 60 days to assure that the sides, bottoms, and any penetration points are maintained liquid-tight; 30 TAC §334.45(c)(3)(A), by failing to install an emergency shutoff valve on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; 30 TAC §334.51(b)(2)(B)(ii) and the Code, §26.3475(c)(2), by failing to have a liquid-tight spill container on the super unleaded tank; PENALTY: $9,783; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: Kopperl Independent School District; DOCKET NUMBER: 2010-2016-MWD-E; IDENTIFIER: RN101279396; LOCATION: Bosque County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TPDES Permit Number WQ0013982001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, 30 TAC §305.125(1), and the Code, §26.121(a), by failing to comply with permitted effluent limits for five-day biochemical oxygen demand (BOD_5), DO, and TSS; and 30 TAC §305.125(17) and TPDES Permit Number WQ0013982001, Sludge Provisions, by failing to submit monitoring results at the intervals specified in the permit; PENALTY: $9,160; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(20) COMPANY: Military Highway Water Supply Corporation; DOCKET NUMBER: 2010-2019-MWD-E; IDENTIFIER: RN101524452; LOCATION: Cameron County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: the Code, §26.121(a)(1), 30 TAC §305.125(1), and TPDES Permit Number WQ0013462008, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations for NH_3N; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0013462008, Monitoring and Reporting Requirements Number 1, by failing to submit results at the intervals specified in the permit; PENALTY: $1,145; ENFORCEMENT COORDINATOR: Marty Hott, (512) 239-2587; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(21) COMPANY: Monterey Mushrooms, Inc.; DOCKET NUMBER: 2010-2000-IWD-E; IDENTIFIER: RN100831312; LOCATION: Madisonville, Madison County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), the Code, §26.121(a), and TPDES Permit Number WQ0001896000, Effluent Limitations and Monitoring Requirements Number 1 for Outfall 001 and Effluent Limitations and Monitoring Requirements Number 2 for Outfall 004, by failing to comply with permitted effluent limitations for platinum cobalt, copper, and pH; and 30 TAC §305.125(17) and §319.1 and TPDES Permit Number WQ0001896000, Monitoring and Reporting Requirements Number 1, by failing to timely submit effluent monitoring results at the intervals specified in the permit; PENALTY: $9,720; ENFORCEMENT COORDINATOR: Carlie Konkol, (512) 239-0735; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(22) COMPANY: Oxid L.P.; DOCKET NUMBER: 2009-1636-IWD-E; IDENTIFIER: RN100210350; LOCATION: Houston, Harris County; TYPE OF FACILITY: organic chemical processing; RULE VIOLATED: TPDES Permit Number WQ0002102000, Effluent Limitations and Monitoring Requirements Number 1, 30 TAC §305.125(1), and the Code, §26.121(a), by failing to comply with permitted effluent limits for chemical oxygen demand; PENALTY: $16,915; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(23) COMPANY: Perkins Aluminum Smelting Inc.; DOCKET NUMBER: 2011-0179-WQ-E; IDENTIFIER: RN101997674; LOCATION: Balch Springs, Dallas County; TYPE OF FACILITY: stormwater; RULE VIOLATED: 30 TAC §382.25(a)(4), by failing to obtain a Multi-Sector General Permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: R Construction Company; DOCKET NUMBER: 2011-0195-WR-E; IDENTIFIER: RN105950448; LOCATION: Chireno, Nacogdoches County; TYPE OF FACILITY: water rights; RULE VIOLATED: the Code, §11.081 and §11.121, by impounding, diverting, or using state water without a required permit; PENALTY: $350; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(25) COMPANY: Ray French Land Company, Limited; DOCKET NUMBER: 2011-0135-WQ-E; IDENTIFIER: RN106020282; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: stormwater; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(26) COMPANY: Rudy's West Bar-B-Q, LLC; DOCKET NUMBER: 2010-1871-AIR-E; IDENTIFIER: RN105355150; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: convenience store/truck stop with retail sales of gasoline; RULE VIOLATED: 30 TAC §114.100(a) and THSC, §382.085(b), by failing to comply with the minimum oxygen content of 2.7% by weight of gasoline; PENALTY: $920; ENFORCEMENT COORDINATOR: Gena Hawkins, (512) 239-2583; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(27) COMPANY: Seventeen Lakes Homeowners Association, Inc.; DOCKET NUMBER: 2010-1733-WR-E; IDENTIFIER: RN105990543; LOCATION: Denton County; TYPE OF FACILITY: property; RULE VIOLATED: 30 TAC §297.11 and the Code, §11.121, by failing to obtain authorization prior to impounding, diverting, or using state water; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(28) COMPANY: STOLTHAVEN HOUSTON INC.; DOCKET NUMBER: 2010-1667-IWD-E; IDENTIFIER: RN100210475; LOCATION: Houston, Harris County; TYPE OF FACILITY: refuse systems with an associated wastewater treatment; RULE VIOLATED: the Code, §26.121(a)(1), 30 TAC §305.125(1), and TPDES Permit Number WQ0003129000, Effluent Limitations and Monitoring Requirements Numbers 1 and 4 for Outfall Number 003, by failing to comply with permitted effluent limitations for CBOD and DO; PENALTY: $20,100; SEP offset amount of $10,050 applied to Gulf Coast Waste Disposal Authority - River, Lakes, Bays, and Bayous Trash Bash; ENFORCEMENT COORDINATOR: Marty Hott, (512) 239-2587; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(29) COMPANY: TOTAL PETROCHEMICALS USA, INC.; DOCKET NUMBER: 2010-1300-AIR-E; IDENTIFIER: RN102457520; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §§101.20(3), 116.115(b), (b)(2)(F) and (c), and 122.143(4), THSC, §382.085(b), FOP Number O-01267, STC Number 28, Air Permit Numbers 2347, 8983A, 9194A and PSD-TX-453M6, by failing to comply with the allowable hourly emissions rates; 30 TAC §116.115(b), (b)(2)(F) and (c), §122.143(4), THSC, §382.085(b), FOP Number O-01267, STC Number 28, Air Permit Number 5694A, General Condition (GC) Number 8, by failing to comply with the allowable hourly emissions rates; 30 TAC §§101.20(3), 116.115(b), (b)(2)(F) and (c), and 122.143(4), THSC, §382.085(b), FOP Number O-01267, STC Number 28, and Air Permit Numbers 16840 and PSD-TX-688M2, SC Number 2 and GC Number 8, by failing to comply with the allowable hourly emissions rates and concentrations; 30 TAC §116.115(b)(2)(F) and (c), and §122.143(4), THSC, §382.085(b), FOP Number O-01267, STC Number 28, and Air Permit Number 56385, SC Number 1, by failing to comply with the allowable hourly emissions rates; 30 TAC §§101.20(1) and (3), 116.115(b)(2)(F) and (c), and 122.143(4), 40 CFR §60.104(a)(2)(i) and (e)(4)(i), THSC, §382.085(b), FOP O-01267, STC Number 28, Air Permit Numbers 9195A and PSD-TX-453M6, by failing to comply with the allowable hourly emissions rates and concentrations; 30 TAC §§101.20(3), 116.115(b), (b)(2)(F) and (c), and 122.143(4), THSC, §382.085(b), FOP Number O-01267, STC Number 28, and Air Permit Numbers 18936 and PSD-TX-762M3, SC Number 8, by failing to comply with the allowable hourly emissions rates and concentrations; 30 TAC §§113.780, 116.115(c), and 122.143(4), 40 CFR §63.1567(a)(2), THSC, §382.085(b), FOP Number O-01267, STC Number 28, and Air Permit Number 5694A, SC Number 3, by failing to maintain the proper temperature at the chlorosorb inlet, 30 TAC §§106.6, 116.115(b) and (b)(2)(F), and 122.143(4), THSC, §382.085(b), FOP Number O-01267, STC Number 28, Air Permit Numbers 5694A and 18963 and PSD-TX-762M2, GC Number 8, Air Permit Numbers 46396 and PSD-TX-1073, 56386, and 46409, SC Number 1, by failing to comply with the annual allowable emission rates; 30 TAC §§116.110(a), 116.115(c), and 122.143(4), THSC, §382.085(b), FOP Number O-01267, STC Number 28 and Air Permit Number 49743, SC Number 4, by failing to authorize Tank 586, EPN 22TANK0586, for current service; 30 TAC §116.115(c) and §122.143(4), THSC, §382.085(b), FOP Number O-01267, STC Number 28, and Air Permit Numbers 46396 and PSD-TX-1073, SC Number 18 and 19, (previously Special Condition 10), by failing to load within the allowable annual throughput rates at Dock Numbers 1 and 3; 30 TAC §116.115(b)(2)(F) and (c), and §122.143(4), THSC, §382.085(b), FOP Number O-01267, STC Number 28, and Air Permit Number 54026, SC Number 1, by failing to prevent unauthorized emissions; PENALTY: $211,992; SEP offset amount of $84,797 applied to Southeast Texas Regional Planning Commission - Meteorological and Air Monitoring Network; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(30) COMPANY: United States Forest Service; DOCKET NUMBER: 2010-1999-PWS-E; IDENTIFIER: RN101222248; LOCATION: Gray County; TYPE OF FACILITY: federal park with a PWS; RULE VIOLATED: 30 TAC §290.46(d)(2)(A) and §290.110(b)(2), by failing to operate the disinfection equipment to maintain a disinfectant residual of at least 0.2 mg/L free chlorine throughout the distribution system at all times; PENALTY: $205; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

TRD-201100619

Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 15, 2011

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Invitation for Public Comment

The Texas Commission on Environmental Quality (TCEQ or commission) announces the availability of the Fiscal Year 2010 Update to the Water Quality Management Plan (WQMP) developed for the Houston-Galveston region of Texas prepared by the Houston-Galveston Area Council (H-GAC).

The WQMP update is developed and promulgated in accordance with the requirements of the federal Clean Water Act, §208 and §604(b). The WQMP update includes WQMP review and coordination, wastewater infrastructure planning elements, and support for watershed planning in the Lake Houston Watershed. Once the commission certifies the WQMP update, it is submitted to the United States Environmental Protection Agency for approval. The draft WQMP may contain service area populations for specific wastewater treatment facilities, designated management agency information, and data to support current wastewater infrastructure planning elements.

A copy of the Fiscal Year 2010 H-GAC WQMP update may be found at the Houston-Galveston Area Council Web site located at *http://www.h-gac.com/community/water/quality.* A copy of the update may also be viewed at the TCEQ Library, Building A, 12100 Park 35 Circle, Austin, Texas.

Written comments on the draft WQMP update may be submitted to Dr. Clyde E. Bohmfalk, Texas Commission on Environmental Quality, Water Quality Planning Division, MC 203, P.O. Box 13087, Austin, Texas 78711-3087. Comments may also be faxed to (512) 239-4732, but must be followed up with the submission and receipt of written comments within three working days of when they were faxed. Written comments must be submitted no later than 5:00 p.m. on March 31, 2011. For further information, or questions, please contact Dr. Bohmfalk at (512) 239-1315 or by email at *clyde.bohmfalk@tceq.texas.gov.*

TRD-201100610
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 15, 2011

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Notice - Extension of Deadline for Nominations to Fill Positions on the Pollution Prevention Advisory Committee

In the January 28, 2011, issue of the *Texas Register* (36 TexReg 458), the Texas Commission on Environmental Quality (commission) published a Notice of Request for Nominations to Fill Positions on the Pollution Prevention Advisory Committee. The deadline to receive the written nominations was published as February 11, 2011.

The commission has extended the deadline for receipt of written nominations to 5:00 p.m., March 11, 2011, for the Notice of Request for Nominations to Fill Positions on the Pollution Prevention Advisory Committee. Written nominations must be received in the Small Business and Environmental Assistance Division Office by 5:00 p.m. on March 11, 2011.

Nominations should be directed to Mary Kelley, Pollution Prevention and Education Section (MC 113), Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087. They can also

be sent via e-mail to *recycle@tceq.texas.gov* or they can be faxed to (512) 239-1065. Documents can also be submitted via hand delivery to the Pollution Prevention and Education Section, MC 113, 12100 Park 35 Circle, Building F, Suite 1301, Austin, Texas 78753.

Questions regarding the Pollution Prevention Advisory Committee and the current nominations process can be directed to Mary Kelley at (512) 239-6324. For more information, visit the Web site at *http://www.tceq.texas.gov/p2/P2Recycle/ppac/PollutionPrevention-AdvisoryCommittee.html.*

TRD-201100611
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 15, 2011

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Notice of Issuance of a New Air Quality Standard Permit for Pollution Control Projects

The Texas Commission on Environmental Quality (TCEQ or commission) is issuing a new non-rule standard permit (SP) for pollution control projects (PCP) under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.05195, Standard Permit, §382.057, Exemption, and 30 Texas Administrative Code (30 TAC) Chapter 116, Subchapter F, Standard Permits.

Copies of the PCP SP may be obtained from the TCEQ Web site at *http://www.tceq.texas.gov/permitting/air/nav/standard.html* or by contacting the TCEQ, Office of Permitting and Registration, Air Permits Division, at (512) 239-1250 or Mandolin Shannon at (512) 239-6541.

OVERVIEW OF AIR QUALITY STANDARD PERMIT

The new air quality PCP SP can be used to authorize PCP on or after the effective date of the SP. PCPs are projects undertaken voluntarily or as required by any federal or state statute or rule that reduce or maintain currently authorized air emission limits for facilities authorized by a New Source Review (NSR) permit under Chapter 116, an SP adopted under Chapter 116, Subchapter F, or Permits by Rule (PBR) adopted under 30 TAC Chapter 106. The SP contains administrative requirements, control and operating requirements, and recordkeeping requirements to ensure the protection of air quality standards and public health.

PUBLIC NOTICE AND COMMENT PERIOD

As required by §116.603, Public Participation in Issuance of Standard Permits, the TCEQ published notice of the proposed SP in the *Texas Register* and newspapers of general circulation in the following metropolitan areas: Austin, Dallas, and Houston. The notice was published in the August 27, 2010, issue of the *Texas Register* (35 TexReg 7928) and the public comment period ended on September 27, 2010.

PUBLIC MEETING

The TCEQ held a public meeting on the proposed SP on September 20, 2010, in Austin, Texas. Although a number of persons attended the meeting, no one submitted formal comments at the public meeting.

ANALYSIS OF COMMENTS

Comments were received from Luminant and United States Environmental Protection Agency (EPA) Region 6.

Luminant commented that condition number 1.D.(iii) may contain a typographical error. Specifically, Luminant commented that use of the word "until" seems inconsistent with the remainder of the condition, and also seems to make 1.D.(iii) inconsistent with 1.D.(i).

No changes were made in response to this comment. Paragraph (1)(D)(i) allows facilities that made changes under standard permit registrations obtained under previous versions of the PCP SP to continue to operate under the version of the SP that was effective at the time of authorization.

Paragraph (1)(D)(iii) requires authorizations under previous versions of the PCP SP to renew the authorization upon the ten-year anniversary of the original registration using the new non-rule SP, or until the authorization is administratively incorporated into the facilities' permit. In cases where incorporation of the SP is completed by incorporation by reference, rather than incorporation by consolidation, the SP must be renewed using the new non-rule SP.

Paragraph (i) is a type of "savings clause" that allows operation for registrations under a previous version of the PCP SP so that those PCPs do not have to meet the requirements of this new PCP SP. However, that ability to operate is limited by paragraphs (ii) and (iii). Therefore, the two paragraphs are not inconsistent. This is consistent with the commission's rule regarding duration and renewal of registrations to use SPs in §116.604.

EPA commented that it continues to have the same concerns expressed in the disapproval notice published on September 15, 2010 in the *Federal Register* (75 *FR* 56423). EPA's comment letter specifically referred to its determination that the PCP SP, as proposed, does not meet the Texas Standard Permits NSR State Implementation Plan (SIP), approved November 14, 2003 (68 *FR* 64545) because it applies to numerous types of PCPs which can be used at any source that wants to use a PCP. EPA stated that the SIP provides an alternative process for approving the construction of certain categories of new and modified sources by providing a streamlined mechanism within categories which contain numerous similar sources.

EPA's second comment is that 40 Code of Federal Regulations (CFR) §70.6(d), one of its rules for the operating permits program under the Federal Clean Air Act (FCAA), Title V, states that general permits must be issued to cover "numerous similar sources." EPA states that it views this rule as a requirement to be followed when developing general permits issued under FCAA, Title I, as well as permits developed under Title V. EPA again referred to the documents cited in its proposed disapproval notice published on September 23, 2009 (74 *FR* 48476).

The following addresses EPA's reasons for not approving the original version of §116.617, for disapproving the version of §116.617 adopted in 2006, and this new PCP SP. The commission concludes that EPA's basic opposition as expressed in these notices and comments is not based in applicable law, and that each version of the PCP SP complies with the Texas SIP and federal law as in effect at the time adopted or issued. In this new PCP SP, the commission has, however, made changes in the issued PCP SP with regard to replicable procedures to ensure establishment of an enforceable permit.

EPA's Original Analysis of §116.617 PCP SP

Prior to the September 23, 2009 EPA notice, EPA had provided only one reason for not approving an earlier version of §116.617 submitted to EPA December 9, 2002. In a notice dated November 14, 2003, (68 *FR* 64547), EPA stated that it was not approving §116.617 because it did not include any provisions relating to the process by which the standard permit must be issued or modified. No other reasons were included in the 2003 notice. In that notice, and two subsequent notices, EPA approved the commission's Standard Permit Program, which includes the requirements for issuance of an SP, that is, the process by which the commission proposes and adopts all SPs. Those rules are in §§116.601 - 116.615, all of which are approved into the SIP, except the most recent version of §116.610 (40 CFR §52.2270). Furthermore, §116.617 and this newly issued PCP SP includes the registration and

registration review requirements that are prerequisites for use of a PCP SP. Therefore, this EPA stated concern has been addressed by the commission; this is discussed in further detail in Section IV Permit Condition and Analysis.

In the proposed disapproval notice (2009), EPA added several reasons for proposed disapproval of the PCP SP. The following addresses those comments.

Minor NSR SIP Revision Under the FCAA and EPA rules

EPA commented in the proposed disapproval and final disapproval *FR* notices that the latest version of the PCP SP in §116.617, even after it was amended to address the *New York* opinion, does not meet the requirements for a minor NSR SIP revision. In the September 23, 2009 issue of the *Federal Register* (74 *FR* 48476), EPA acknowledges that §116.617 (as adopted in 2006) explicitly prohibits the use of the PCP SP for new major sources and major modifications, thus addressing the court's decision in *New York v. EPA.* This proposed SP is specifically designed to be part of the minor NSR permit program *(See* Section (1)(A)).

In the proposed disapproval notice, EPA states that this type of minor NSR permit is required to be applicable to "narrowly defined categories of emission sources, rather than a category of *emission types."* (emphasis supplied). Then, it states that the basis for proposing disapproval of §116.617 as part of the SIP is that " {a} Standard Permit is a minor NSR permit limited to a particular narrowly defined source category for which the permit is designed to cover and cannot be used to make site-specific determinations that are outside the scope of this type of permit." EPA does not cite any statute or rule that provides the legal basis for its finding. If there is no specific statute regarding SPs, and the commission is unaware that there is any such reference in the FCAA, then EPA must rely on its rules as a valid legal basis for this proposed finding.

EPA's approval of the commission's Standard Permits Program is a finding that the FCAA and relevant permitting rules are satisfied. The commission's existing §116.617 and this new PCP SP meet those applicable laws and the Texas Minor NSR SIP as discussed in the following.

FCAA §110(a)(3) provides that "air pollution prevention and air pollution control at its source is the primary responsibility of States and local governments." This general obligation must be read in conjunction with §110(a)(2)(C), which includes the requirement to have a minor NSR permit. EPA has acknowledged that states have broad discretion to develop their minor NSR programs *(See* e.g., EPA comments to Texas in the November 26, 2008 issue of the *Federal Register* (73 *FR* 72008), which state "EPA recognizes that, under the applicable Federal regulations, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the NAAQS. The State has significant discretion to tailor minor NSR requirements that are consistent with the requirements of Part 51. The State may also provide a rationale for why the rules are at least as stringent as the Part 51 requirements where the revisions are different from Part 51)."

EPA has not adopted any rules that provide detailed requirements for this type of permit, nor any rules prohibiting it. In fact, the applicable rule in 40 CFR §51.160 is broadly written and has been interpreted by EPA to provide states discretion to tailor their own minor NSR permit programs. As noted earlier, the commission's Standard Permit Program is part of the approved Texas SIP, and EPA has determined it meets 40 CFR Part 51. With regard to 40 CFR §51.160, the commission provides the following analysis to demonstrate that this proposed new SP meets the rule, as well as the SIP-approved Standard Permit Program.

40 CFR §51.160(a) requires that SIPs set forth legally enforceable procedures that enable a state to determine whether construction or modification of a source will result in a violation of the applicable portions of the control strategy or interfere with attainment or maintenance of any National Ambient Air Quality Standards (NAAQS) in which the proposed source or modification is located. THSC, §382.0518, and the Texas SIP require that all facilities, as that term is defined in THSC, §382.003 and §116.10(6), obtain a permit prior to construction or modification. The commission has implemented this requirement through its major and minor NSR permit programs, which are SIP approved (40 CFR §52.2270). Failure to comply with these requirements subjects the applicant to enforcement under the TCAA and the Texas Water Code, Chapters 5 and 7.

Construction and operation under a registration of an SP requires compliance with the applicable rules of the commission (§116.615(10)). In this permit, applicable conditions are specifically included in Section (2). The applicable conditions include protection of public health (§116.610 and §116.615(1)). In this SP, these requirements are included in Sections (1)(C)(ii) and (2)(G) and (H).

40 CFR §51.160(b) requires the SIP to include permit procedures to address the requirements in 40 CFR §51.160(a), ensuring that there will be no violations. In addition to the commission's enforcement authority, compliance with 40 CFR §51.160(b) is met by §§116.610, 116.611, and 116.615 and Sections (1)(C)(ii), (2)(G) and (H), (4), and (5)(A) of this SP.

40 CFR §51.160(c) requires that the procedures include submission of specific information to make the determination in subsection (a), and subsection (d) requires that the procedures provide that approval of any construction or modification must not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy. These are met by §§116.610, 116.611, and 116.615, and in Section (4) of this SP.

40 CFR §51.160(e) requires that the procedures identify what types and sizes of facilities are subject to review and the basis for determining which facilities are subject to review. This SP meets this requirement in Sections (1) and (3).

Finally, 40 CFR §51.160(f) requires that the procedures discuss the air quality data and the dispersion or other air quality modeling used to meet the requirements of this subpart. Modeling may be required to demonstrate that any collateral increases in actual or allowable emission rates are protective of the NAAQS, public health and welfare, and physical property. This requirement is met by §116.615 and Section (2)(G) of this SP.

In addition, given that Texas has a long history of implementing a comprehensive air permitting program, most of which is in the approved Texas SIP and includes the Standard Permit Program, the commission is not persuaded that the EPA guidance memos and rulemaking for other states cited in the *FR* notice provide adequate authority for proposing disapproval of §116.617. In particular, the *FR* notices cited on September 23, 2009 (74 *FR* 48476) does not concern PCP SPs, and does not involve disapprovals based on any failure to meet applicable legal requirements for minor NSR SIPs.

EPA's reliance on 40 CFR §70.6(d) and Guidance Documents is Unsupportable Basis for Disapproval

In its comments regarding this PCP SP, EPA cited 40 CFR §70.6(d), a rule adopted under FCAA, Title V for the operating permits program. The rule was not adopted under the authority of FCAA, Title I relating to NSR. EPA's "view" that this rule is a *requirement* to be followed when developing general permits under FCAA, Title I is not supported by any rulemaking that adopts this position under FCAA, Title I. For this to be a requirement to be followed for any "general" NSR permits issued by either EPA or any State, EPA must conduct rulemaking under

the Federal Administrative Procedure Act, which provides opportunity for notice and comment of its proposed requirement *(See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000)). EPA's appropriation of 40 CFR §70.6(d) for NSR purposes is apparently due to the lack of a rule adopted by EPA under its authority in FCAA, Title I. Additionally, EPA's approval of the commission's Standard Permits Program in 2003 did not cite 40 CFR §70.6(d) as authority for that approval. EPA's "view" of its view of rule applicability simply has no basis in law. Lastly, EPA has cited no rational basis for applying 40 CFR §70.6(d) to the NSR program generally, or to its review of the PCP SP specifically. Without such an explanation, the commission has no information to review and cannot take action to change the proposed rule.

Similarly, guidance documents are not legally binding on states. For EPA to adopt binding requirements, it must do so through notice and comment rulemaking. *(Appalachian Power Co. v. EPA. Id.)* Therefore, if EPA wants requirements for standard permits to be limited to a particular narrowly defined source category, it must do so through rulemaking. The analysis provided by the Texas Association of Business on pages 8-12 of its comment letter in response to the *FR* notice (under Docket ID Number EPA-R06-OAR-2006-0133) provides specific analysis of the guidance documents cited by EPA and concludes that these documents are related to EPA's consideration of various mechanisms to limit potential to emit (PTE). Minor NSR permit programs do provide the ability to establish a PTE. However, not only do the cited memos not discuss PTE for pollution control SPs, they do not provide any legal basis for disapproval of this type of permitting program as a minor NSR program. Additionally, EPA has provided no rational basis for why the commission's decisions regarding source category limitations are inappropriate, or fail to assure attainment and maintenance of the NAAQS. Given that EPA has approved the commission's minor case-by-case, SP, and PBR minor NSR programs, the commission is not persuaded that the guidance EPA relies on is appropriate for evaluation of a minor NSR PCP SP.

The Texas Minor NSR SIP

In its approval of the Texas Standard Permit Program, EPA characterized the program as one that provides for a streamlined mechanism for approving the construction of certain sources within categories that contain numerous similar sources, and states that an SP is available to sources that belong in categories for which TCEQ has adopted an SP under Chapter 116, Subchapter F in the November 14, 2003, issue of the *Federal Register* (68 *FR* 64546). The TCEQ rules which EPA approved in that rulemaking do not describe the program as applicable to "narrowly defined source" categories. The TCAA provides the commission with authority to issue standard permits for new or existing similar facilities, provided certain findings are made. For the PCP SP, the similarities are in the application and use of the permit to control emissions of air contaminants. Numerous similar sources within categories will apply to use the PCP SP to control emissions in similar ways. The approved program allows for a SP, like this one, that has broad applicability because the necessary safeguards for protection of public health and compliance with other applicable legal requirements, as discussed elsewhere in this proposal, are included in the PCP SP.

In addition to the lack of a supportable legal basis for its proposed disapproval, EPA's specific comments regarding its analysis as to why §116.617 does not meet the requirements of a minor NSR SIP are also not supported by statute or rule. EPA's first comment is that it remains a generic permit that applies to numerous types of PCPs, which can be used at any source that wants to use it, and the PCP SP does not delineate the type of pollution control equipment that is authorized. EPA stated that an individual SP must be limited to a single source category which consists of numerous similar sources that can meet standardized permit conditions.

The PCP SP, which was first adopted by the commission in 1995, was and is based on both the requirements to properly control the quality of the air, and policy that promotes an efficient and compliant means for achieving that requirement. The commission's PCP SP was adopted for ease of meeting requirements to install certain pollution control equipment both as required under law and to voluntarily achieve emission reductions. The commission has found that a streamlined, yet protective, mechanism for installing pollution control equipment meets both the legal and public policy goals for clean air. The commission finds no basis to adopt separate permits for individual types of facilities (or, as EPA describes it, for single source categories), with the exact same conditions. The proposed PCP SP clearly distinguishes the requirements for replacement of controls from those for new controls.

The commission disagrees with EPA's second comment in the proposed disapproval notice, which is that §116.617 is designed for case-by-case review and source specific technical determinations, saying that if these types of determinations are necessary, then the state must use its minor NSR SIP case-by-case process under §116.10(a)(1). Although this new PCP SP requires the owner or operator to provide documentation that demonstrates that all PCP SP requirements will be met, which is checked by the executive director, there is no case-by-case review. Rather, the executive director's staff ensures that compliance can be achieved with the PCP SP as well as any other applicable authorizations, and the executive director provides written acceptance of the project. If case-by-case review or facility specific technical determinations are necessary, the executive director's staff can notify the owner or operator that the PCP SP would not be available and that a NSR permit under Chapter 116, Subchapter B would be required.

Next, EPA commented in the proposed disapproval notice that the PCP SP does not contain replicable conditions that state how the executive director's discretion is to be implemented for the individual determinations, particularly with regard to those necessary in individual cases in lieu of generic enforceable requirements. EPA stated that specific replicable criteria must be set forth in the PCP SP establishing equivalent emissions rates and ambient impact. The owner or operator must provide adequate information that is checked by the executive director's staff to ensure compliance with all federal and state rules and regulations, rather than making individual determinations. As discussed below, the commission addresses this comment in Section (4) of this proposed SP, explaining that the conditions of this new PCP SP are enforceable and replicable permit procedures and conditions.

Finally, EPA commented in the proposed disapproval notice that the PCP SP is not the appropriate vehicle for any case-by-case establishment of recordkeeping and monitoring requirements. This new PCP SP requires owners or operators to maintain copies on site of the testing, monitoring, or other emission records to demonstrate that the pollution control project is operated consistent with the requirements of the PCP SP. The PCP SP allows for replacement of control equipment, and therefore, the recordkeeping requirements of any other applicable authorizations would apply. For new equipment, the requirements in Sections (1) and (5)(B) apply.

In summary, EPA has not expressly restricted the use nor applicability of general permits to achieve emission reductions from new or existing facilities for activities that are for the purpose of reducing or maintaining emissions by rulemaking adopted under FCAA, Title I. The scope of the SP is limited to emission reduction activities at existing facilities to control emissions in similar ways to reduce or maintain emissions. Thus, this new PCP SP meets EPA's purported standard that a permit be limited to similar sources.

TRD-201100615
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 15, 2011

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Notice of Water Quality Applications

The following notice was issued on February 4, 2011 through February 11, 2011.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

CITY OF GRAND SALINE has applied for a renewal of TPDES Permit No. WQ0010179001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 540,000 gallons per day. The facility is located east of the intersection of the T&P Railroad and State Highway 110, approximately 0.5 mile east-southeast of the intersection of U.S. Highway 80 and State Highway 110 in Van Zandt County, Texas 75140.

WESTERN DAIRY TRANSPORT L L C which operates the Western Dairy bulk milk transport services terminal, has applied for a major amendment to TPDES Permit No. WQ0004314000 to authorize conversion of the existing discharge permit to a Texas Land Application Permit (TLAP). The existing permit authorizes the discharge of treated process wastewaters (wash waters or rinse waters) consisting of treated tank cleaning wash water, vehicle wash water, and maintenance wastewaters at a daily average flow not to exceed 10,000 gallons per day via Outfall 001. The proposed permit would authorize the disposal of treated process wastewaters (wash waters or rinse waters) consisting of tank wash water and vehicle cleaning and maintenance wastewaters from a milk transportation fleet via irrigation of 3.5 acres of land at a daily average flow not to exceed 2,000 gallons per day. This permit does not authorize the discharge of pollutants into water in the State. The facility and the disposal site are located at 771 County Road 176 (Smith Springs Road), approximately 0.25-mile northeast of the intersection of U.S. Highway 281 and County Road 176, north of the City of Stephenville, Erath County, Texas 76401.

TEXAS MICROBIAL APPLICATIONS INC has applied for new Texas Pollution Discharge Elimination System (TPDES) Sludge Permit No. WQ0004939000 (EPA I.D. No. TXL005019) to authorize the composting of wastewater treatment plant sludge. This permit will not authorize a discharge of pollutants into waters in the State. The sludge processing facility will be located south of the St. Louis Southwestern Railroad, approximately 7,000 feet northeast of the intersection of Interstate Highway 30 and Farm-to-Market Road 1870, in Hopkins County, Texas 75482.

CITY OF CELESTE has applied for a renewal of TPDES Permit No. WQ0010146001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 94,800 gallons per day. The facility is located approximately 4000 feet west of U.S. Highway 69 and approximately one mile south-southwest of the intersection of U.S. Highway 69 and the Atchison-Topeka and Santa Fe Railway in Hunt County, Texas 75423.

CITY OF HALLSVILLE has applied for a renewal of TPDES Permit No. WQ0010460001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility is located approximately 6,200 feet east of the intersection of Farm-to-Market Road 450 and U.S. Highway 80 and 1,100 feet south of U.S. Highway 80 in Harrison County, Texas 75650.

CITY OF WORTHAM has applied for a renewal of TPDES Permit No. WQ0010551001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 195,000 gallons per day. The facility is located approximately 0.75 mile east of State Highway 14 and one mile north of Farm-to-Market Road 27 in the northeast section of the City of Wortham in Freestone County, Texas 76693.

SAN ANTONIO RIVER AUTHORITY has applied for a renewal of TPDES Permit No. WQ0010749004, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,500,000 gallons per day. This facility is also authorized to land apply wastewater treatment plant sludge for beneficial land use on 63.1 acres of land where the treatment facility is located. The domestic wastewater treatment facility and beneficial land use site are located at 1720 Farm-to-Market Road 1516 North, approximately 1.15 miles south of the intersection of Interstate Highway 10 and Farm-to-Market Road 1516 in Bexar County, Texas 78109

CONROE INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0012204001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility is located on the grounds of Stephen F. Austin Elementary School, approximately 1,250 feet west of the intersection of State Highway 105 and Waukegan Road in the Town of Cut and Shoot in Montgomery County, Texas 77306.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 276 has applied for a renewal of TPDES Permit No. WQ0012927001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 750,000 gallons per day. The facility is located approximately 800 feet west of the intersection of State Highway 6 and West Little York Road and approximately 100 feet south of West Little York Road in Harris County, Texas 77084.

TRINITY INDUSTRIES INC has applied for a renewal of TPDES Permit No. WQ0014249001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 8,750 gallons per day. The facility is located approximately 1,900 feet southeast of the intersection of U.S. Highway 80 and County Road 3438 in Harrison County, Texas 75602.

CITY OF EDGEWOOD has applied for a renewal of TPDES Permit No. WQ0014648001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately 6,000 feet north of the intersection of Farm-to-Market Road 859 and U.S. Highway 80 and 2,200 feet east of Farm-to-Market Road 859 in Van Zandt County, Texas 75117.

CITY OF LAKEPORT has applied for a renewal of TPDES Permit No. WQ0014721001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The facility is located approximately 1,200 feet northeast of the intersection of State Highway 149 and State Highway 322 in the City of Lakeport in Gregg County, Texas 75603.

SKYMARK DEVELOPMENT COMPANY INC has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014992001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day. The facility will be located approximately 2,650 feet west of the intersection of Howell Road and North Street,

on the north side of West Fork Chocolate Bayou in Fort Bend County, Texas 77583.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201100639
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 16, 2011

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Notice of Water Rights Applications

Notices issued February 8, 2011 through February 11, 2011.

APPLICATION NO. 05-4658D; Sabine River Authority, 12777 Hwy 87 N, Orange, Texas, Applicant, seeks to amend a 10,000 acre-foot portion of Certificate of Adjudication No. 05-4658 to add an upstream diversion segment on the Sabine River and authorize a maximum combined diversion rate of 34.5 cfs (15,500 gpm) from that segment, for multiple purposes (municipal, industrial, mining, and agriculture) in Panola, Harrison, Rusk and Gregg counties within the Sabine River Basin. More information on the application and how to participate in the permitting process is given below. The application was received on January 26, 2010. Additional information and fees were received on May 12, 2010 and June 15, 2010. The application was declared administratively complete and accepted for filing on June 15, 2010. The TCEQ Executive Director has completed the technical review of the application and prepared a draft amendment. The draft amendment, if granted, would contain special conditions including, but not limited to, stream flow restriction. The application and Executive Director's draft amendment are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F., Austin, TX 78753. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk at the address provided in the information section below within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12548; North Texas Municipal Water District (the District), P.O. Box 2408, Wylie, TX 75098, has applied for a Temporary Water Use Permit to divert and use not to exceed 100,448 acre-feet of water per year for a period of three years from the perimeter of Lake Lavon on the East Fork Trinity River, Trinity River Basin, for municipal purposes within its service area in the Trinity River Basin. More information on the application and how to participate in the permitting process is given below. The application was received on December 16, 2009. Additional information and fees were received on April 22, 2010. The application was declared administratively complete and accepted for filing on May 14, 2010. The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would contain special conditions including, but not limited to, a streamflow restriction and a requirement to maintain the approved accounting plan. The application and Executive Director's draft permit are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F., Austin, TX 78753. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, by March 4, 2011.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing"; and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201100638
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 16, 2011

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on February 9, 2011, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. D.C.T.D., Inc., d/b/a Boomers; SOAH Docket No. 582-10-4853; TCEQ Docket No. 2009-1334-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against D.C.T.D., Inc., d/b/a Boomers on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201100640

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 16, 2011

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Department of State Health Services

Notice of Request for Proposals for Zoonosis Control Animal Friendly Grants for the Spay/Neuter Project

INTRODUCTION

The Department of State Health Service's (DSHS), Zoonosis Control Branch, announces a Request for Proposals (RFP) for the sterilization of dogs and cats owned by the public. The RFP was released on February 15, 2011.

PURPOSE

DSHS, Zoonosis Control Branch, announces the expected availability of fiscal year 2012 state funds from the sale of Animal Friendly license plates to provide grants for the sterilization of dogs and cats owned by the public at no or minimal cost.

PERIOD OF PROJECT

It is expected that the contract will begin on or about September 1, 2011, and will be made for a 12-month budget period with a project period of 2 years.

AVAILABLE FUNDS

Approximately $200,000 is expected to be available to fund multiple contracts. One grant award per project period will be awarded per agency for the sterilization of dogs and/or cats. The specific dollar amount awarded to each applicant depends upon the merit and scope of the proposed project.

ELIGIBLE APPLICANTS

Eligible applicants include: a private or public animal shelter (releasing agency); an organization that is qualified as a charitable organization under Internal Revenue Code, §501(c)(3), that has animal welfare or sterilizing dogs and cats owned by the general public at minimal or no cost as its primary purpose; or a local nonprofit veterinary medical association--an organization set up by and comprised of several volunteer veterinarians in their immediate region for the purpose of presenting continuing education, planning group activities, or discussing issues common to their professional field, and has an established program for sterilizing dogs and cats owned by the general public at minimal or no cost. If an applicant is currently debarred, suspended, or otherwise excluded or ineligible for participation in federal or state assistance programs, the applicant is ineligible to apply for funds under this RFP.

SCHEDULE OF EVENTS

Issuance of the RFP: February 15, 2011

Application Deadline: April 18, 2011, 2:00 p.m. CDT

Award Notification on or about: June 1, 2011

Contract Start Date on or about: September 1, 2011

TO OBTAIN A COPY OF THE RFP

It is preferred that requests to obtain a copy of the RFP, scheduled for release on February 15, 2011, be downloaded from the Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us. Those organizations without Internet access may obtain a copy of the RFP by contacting Stefanie Jackson, Client Services Contracting Unit Mail Code 1886, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, Fax: (512) 458-7351, email: stefanie.jackson@dshs.state.tx.us.

CONTACT PERSON

All communications concerning the RFP shall be addressed in writing, by mail, by fax, or by e-mail to Stefanie Jackson, Client Services Contracting Unit Mail Code 1886, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, Fax: (512) 458-7351, email: stefanie.jackson@dshs.state.tx.us.

TRD-201100637
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: February 16, 2011

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Texas Lottery Commission

Instant Game Number 1311 "Number Safari"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1311 is "NUMBER SAFARI". The play style is "multiple games".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1311 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1311.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols for SCENE 1 (WILD 1), SCENE 2 (TALL 2) and SCENE 4 (FAST 4) are: 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30.. The possible black play symbols for SCENE 3 (MIGHTY 3) and SCENE 5 (FIERCE 5) are: LION SYMBOL, MONKEY SYMBOL, RHINO SYMBOL, BUFFALO SYMBOL, CROCODILE SYMBOL, HYENA SYMBOL, GIRAFFE SYMBOL, ANTELOPE SYMBOL, ZEBRA SYMBOL, TURTLE SYMBOL, TIGER SYMBOL, SNAKE SYMBOL, HIPPO SYMBOL, FISH SYMBOL. A possible black play symbol for SCENE 1 (WILD 1) is 1 SYMBOL. A possible black play symbol for SCENE 2 (TALL 2) is 2 SYMBOL. A possible black play symbol for SCENE 3 (MIGHTY 3) is 3 SYMBOL. A possible black play symbol for SCENE 4 (FAST 4) is 4 SYMBOL. A possible black play symbol for SCENE 5 (FIERCE 5) is 5 SYMBOL. The possible black play symbols for SCENES 1-5 are: $1.00, $2.00, $3.00, $4.00, $5.00, $6.00, $10.00, $20.00, $30.00, $60.00, $100, $300 and $1,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1311 - 1.2D

PLAY SYMBOLS FOR: SCENE 1 (WILD 1), SCENE 2 (TALL 2) SCENE 4 (FAST 4)	CAPTION
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY

PLAY SYMBOLS FOR: SCENE 3 (MIGHTY 3) and SCENE 5 (FIERCE 5)	CAPTION
LION	LION
MONKEY	MONKEY
RHINO	RHINO
BUFFALO	BUFALO
CROCIDILE	CROC
HYENA	HYENA
GIRAFFE	GIRAFFE
ANTLOPE	ANTLOP
ZEBRA	ZEBRA
TURTLE	TURTLE
TIGER	TIGER
SNAKE	SNAKE
HIPPO	HIPPO
FISH	FISH
PLAY SYMBOL FOR SCENE 1: 1 SYMBOL	TRPL
PLAY SYMBOL FOR SCENE 2: 2 SYMBOL	TRPL
PLAY SYMBOL FOR SCENE 3: 3 SYMBOL	TRPL

PLAY SYMBOL FOR SCENE 4: 4 SYMBOL	TRPL
PLAY SYMBOL FOR SCENE 5: 5 SYMBOL	TRPL
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$4.00	FOUR$
$5.00	FIVE$
$6.00	SIX$
$10.00	TEN$
$20.00	TWENTY
$30.00	THIRTY
$60.00	SIXTY
$100	ONE HUND
$300	THR HUND
$1,000	ONE THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $4.00, $6.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $60.00, $100 or $300.

H. High Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1311), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1311-0000001-001.

K. Pack - A pack of "NUMBER SAFARI" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "NUMBER SAFARI" Instant Game No. 1311 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "NUMBER SAFARI" Instant Game SCENE 1 (WILD 1) is determined once the latex on the ticket is scratched off to expose 10 (ten) Play Symbols. SCENE 1 (WILD 1): If a player matches any of YOUR NUMBERS play symbols to either of the WINNING NUMBER play symbol, the player wins the PRIZE for that number. If a player reveals a "1 SYMBOL" play symbol, the player wins TRIPLE the PRIZE for that symbol! A prize winner in the "NUMBER SAFARI" Instant Game SCENE 2 (TALL 2) is determined once the latex on the ticket is scratched off to expose 16 (sixteen) Play Symbols. SCENE 2 (TALL 2): If a player reveals 3 identical NUMBERS play symbols within a ROW, the player wins the PRIZE for that ROW. If a player reveals a "2 SYMBOL" play symbol, the player wins TRIPLE the PRIZE for that row! A prize winner in the "NUMBER SAFARI" Instant Game SCENE 3 (MIGHTY 3) is determined once the latex on the ticket is scratched off to expose 10 (ten) Play Symbols. SCENE 3 (MIGHTY 3): If a player matches any of YOUR SYMBOLS play symbols to either of the WINNING SYMBOL play symbol, the player wins the PRIZE for that symbol. If a player reveals a "3 SYMBOL" play symbol, the player wins TRIPLE the PRIZE for that symbol! A prize winner in the "NUMBER SAFARI" Instant Game SCENE 4 (FAST 4) is determined once the latex on the ticket is scratched off to expose 16 (sixteen) Play Symbols. SCENE 4 (FAST 4): If a player reveals 3 identical NUMBERS play symbols within a ROW, the player wins the PRIZE for that ROW. If a player reveals a "4 SYMBOL" play symbol, the player wins TRIPLE the PRIZE for that row! A prize winner in the "NUMBER SAFARI" Instant Game SCENE 5 (FIERCE 5) is determined once the latex on the ticket is scratched off to expose 10 (ten) Play Symbols. SCENE 5 (FIERCE 5): If a player matches any of YOUR SYMBOLS play symbols to either of the WINNING SYMBOL play symbol, the player wins the PRIZE for that symbol. If a player reveals a "5 SYMBOL" play symbol, the player wins TRIPLE the PRIZE for that symbol! No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. In SCENE 1 (WILD 1) exactly 10 (ten) Play Symbols must appear under the latex overprint on the front portion of the ticket; in SCENE 2

(TALL 2) exactly 16 (sixteen) Play Symbols must appear under the latex overprint on the front portion of the ticket; in SCENE 3 (MIGHTY 3) exactly 10 (ten) Play Symbols must appear under the latex overprint on the front portion of the ticket; in SCENE 4 (FAST 4) exactly 16 (sixteen) Play Symbols must appear under the latex overprint on the front portion of the ticket; in SCENE 5 (FIERCE 5) exactly 10 (ten) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut. SCENE 1 (WILD 1) will have exactly 10 (ten) Play Symbols; SCENE 2 (TALL 2) will have exactly 16 (sixteen) Play Symbols; SCENE 3 (MIGHTY 3) will have exactly 10 (ten) Play Symbols; SCENE 4 (FAST 4) will have exactly 16 (sixteen) Play Symbols; and SCENE 5 (FIERCE 5) will have exactly 10 (ten) Play Symbols. The Play Symbols will appear under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. For each of the five scenes, each of the ticket's Play Symbols as set forth in 2.1.A.13 must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. For each of the five scenes, each of the ticket's Play Symbols as set forth in 2.1.A.13 must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The top prize will appear at least once on every ticket unless otherwise restricted.

C. The designated number of 1, 2, 3, 4 or 5 (tripler) play symbols will only appear on intended winning tickets on the appropriate scene as dictated by the prize structure.

D. There will be no occurrence of a tripler play symbol appearing more than once on a ticket.

E. SCENE 1 (WILD 1): No duplicate WINNING NUMBERS play symbols on a ticket.

F. SCENE 1 (WILD 1): No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

G. SCENE 1 (WILD 1): No duplicate non-winning prize symbols on a ticket.

H. SCENE 2 (TALL 2) & SCENE 4 (FAST 4): No duplicate non-winning prize symbols on a ticket.

I. SCENE 2 (TALL 2) & SCENE 4 (FAST 4): No ticket will contain 3 duplicate play symbols vertically or diagonally.

J. SCENE 2 (TALL 2) & SCENE 4 (FAST 4): There will be many near wins defined as having two duplicate play symbols within a ROW on non-winning tickets.

K. SCENE 2 (TALL 2) & SCENE 4 (FAST 4): No duplicate non-winning ROWs on a ticket.

L. SCENE 3 (MIGHTY 3) & SCENE 5 (FIERCE 5): No duplicate WINNING SYMBOL play symbols on a ticket.

M. SCENE 3 (MIGHTY 3) & SCENE 5 (FIERCE 5): No duplicate non-winning YOUR SYMBOLS play symbols on a ticket.

N. SCENE 3 (MIGHTY 3) & SCENE 5 (FIERCE 5): No duplicate non-winning prize symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "NUMBER SAFARI" Instant Game prize of $1.00, $2.00, $3.00, $4.00, $6.00, $10.00, $20.00, $30.00, $60.00, $100 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery

Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $60.00, $100 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section and 2.3.C of these Game Procedures.

B. To claim a "NUMBER SAFARI" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "NUMBER SAFARI" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "NUMBER SAFARI" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "NUMBER SAFARI" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 1311. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1311 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	672,000	15.00
$2	739,200	13.64
$3	369,600	27.27
$4	117,600	85.71
$6	67,200	150.00
$10	84,000	120.00
$20	16,590	607.59
$30	7,350	1,371.43
$60	3,360	3,000.00
$100	966	10,434.78
$300	336	30,000.00
$1,000	126	80,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.85. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1311 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1311, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201100631
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 16, 2011

♦ ♦ ♦

Instant Game Number 1314 "Spin to Win"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1314 is "SPIN TO WIN". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1314 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1314.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30,31, 32, 33, 34, 35, 36, 00 SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000 or $20,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1314 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
00 SYMBOL	WIN
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100.00	ONE HUND
$1,000	ONE THOU
$20,000	20 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000, or $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1314), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1314-0000001-001.

K. Pack - A pack of "SPIN TO WIN" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B. C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SPIN TO WIN" Instant Game No. 1314 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SPIN TO WIN" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) Play Symbols. If a player matches any of the PLAYER numbers play symbols to either WHEEL NUMBER play symbol, the player wins the PRIZE for that number. If a player reveals a "00" play symbol, the player wins the PRIZE for that symbol instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. No three or more duplicate non-winning prize symbols will appear on a ticket.

C. No duplicate non-winning PLAYER 1 - 10 play symbols on a ticket.

D. No duplicate WHEEL NUMBER play symbols on a ticket.

E. Non-winning prize symbols will never be the same as the winning prize symbol(s).

F. No prize amount in a non-winning spot will correspond with the play symbol (i.e. 5 and $5).

G. The "00" (auto win) play symbol will never appear more than once on a ticket.

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "SPIN TO WIN" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SPIN TO WIN" Instant Game prize of $1,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SPIN TO WIN" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SPIN TO WIN" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SPIN TO WIN" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,040,000 tickets in the Instant Game No. 1314. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1314 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	643,200	12.50
$4	739,680	10.87
$5	96,480	83.33
$10	112,560	71.43
$20	48,240	166.67
$50	53,533	150.19
$100	7,504	1,071.43
$1,000	47	171,063.83
$20,000	8	1,005,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.73. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1314 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1314, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC §401.301(j) and all final decisions of the Executive Director.

TRD-201100632
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 16, 2011

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Instant Game Number 1315 "Cash Extravaganza"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1315 is "CASH EXTRAVAGANZA". The play style is "key number match with auto win and win x 10".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1315 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1315.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, $$ SYMBOL, DOLLAR BILL SYMBOL, $5.00, $10.00, $15.00, $20.00, $50.00, $100, $200, $2,000 and $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1315 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
$$ SYMBOL	WINX10
DOLLAR BILL SYMBOL	WIN
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY

$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND
$2,000	TWO THOU
$50,000	50 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $25.00, $50.00, $100, $150 or $200.

H. High-Tier Prize - A prize of $2,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1315), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1315-0000001-001.

K. Pack - A pack of "CASH EXTRAVAGANZA" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "CASH EXTRAVAGANZA" Instant Game No. 1315 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "CASH EXTRAVAGANZA" Instant Game is determined once the latex on the ticket is scratched off to expose 45 (forty-five) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the PRIZE for that number. If a player reveals a "dollar bill" play symbol, the player wins the PRIZE for that symbol instantly. If a player reveals a double dollar sign "$$" play symbol, the player wins 10 TIMES the PRIZE for that symbol! No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 45 (forty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "$$" (win x 10) will only appear on intended winning tickets as dictated by the prize structure.

C. The "DOLLAR BILL" (auto win) play symbol will never appear more than once on a ticket.

D. No four or more duplicate non-winning prize symbols on a ticket.

E. No duplicate WINNING NUMBERS play symbols on a ticket.

F. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

I. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "CASH EXTRAVAGANZA" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100, $150 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $25.00, $50.00, $100, $150 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "CASH EXTRAVAGANZA" Instant Game prize of $2,000, or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "CASH EXTRAVAGANZA" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "CASH EXTRAVAGANZA" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "CASH EXTRAVAGANZA" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1315. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1315 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	480,000	12.50
$10	680,000	8.82
$15	80,000	75.00
$20	100,000	60.00
$25	80,000	75.00
$50	80,000	75.00
$100	3,450	1,739.13
$150	2,250	2,666.67
$200	600	10,000.00
$2,000	450	13,333.33
$50,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.98. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1315 without advance notice, at which point no further tickets in that game may be sold. The determination of the closing date and reasons for closing the game will be made in accordance with the instant game closing procedures and the Instant Game Rules, 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1315, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201100633

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 16, 2011

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on Northland Cable Properties, Inc., to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Northland Cable Properties, Inc. for Amendment to a State-Issued Certificate of Franchise Authority, Project Number 39141.

The requested amendment is to expand the service area footprint to include the municipality of Roman Forest, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 39141.

TRD-201100623
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 15, 2011

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Notice of Application for Service Area Exception

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 11, 2011, for an amendment to certificated service area for a service area exception within Dallam County, Texas.

Docket Style and Number: Application of Southwestern Electric Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for Electric Service Area Exception within Dallam County. Docket Number 39138.

The Application: Southwestern Electric Cooperative, Inc. (SEC) filed an application for a service area boundary exception to allow SEC to provide service to a specific customer located within the certificated service area of Rita Blanca Electric Cooperative, Inc. (RBEC). RBEC has provided a letter of concurrence for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than March 8, 2011, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 39138.

TRD-201100624
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 15, 2011

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on February 9, 2011, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County (North Plaza). Docket Number 39130.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville. BPUB received a letter request from Rafael Chacon requesting BPUB to provide electric utility service to a 7.602-acre tract of property. The estimated cost to BPUB to provide service to this proposed area is $13,693.56. The area is presently undeveloped. AEP and BPUB each have distribution facilities in the area needed to provide service. If the application is granted, the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than March 8, 2011, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 39130.

TRD-201100622
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 15, 2011

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Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 14, 2011, for waiver of denial by the Pooling Administrator (PA) of Sprint Communications Company L.P.'s (Sprint) request for assignment of one (1) thousand-block of numbers in the Grand Prairie rate center.

Docket Title and Number: Petition of Sprint Communications Company L.P. for Waiver of Denial of Numbering Resources for Grand Prairie Rate Center, Docket Number 39143.

The Application: Sprint requested one (1) thousand-block of numbers on behalf of its customer, Time Warner Cable, in the Grand Prairie rate center. Sprint submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because Sprint did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than March 7, 2011. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All comments should reference Docket Number 39143.

TRD-201100625
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 15, 2011

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Texas State University-San Marcos

Award of Consultant Contract Notification

Texas State University-San Marcos ("Texas State") in accordance with the provisions of Texas Government Code, Chapter 2254, entered into a contract for consulting services with MGT of America, Inc. ("Consultant"), as more particularly described in the invitation to consultants to provide consulting services, published in the December 24, 2010, issue of the *Texas Register* (35 TexReg 11766).

Project Description:

In accordance with the invitation and Consultant's response, Consultant shall prepare a "Market and Financial Feasibility Review" of the Texas State campus housing system.

Name and address of Consultant:

MGT of America, Inc.

2123 Centre Pointe Boulevard

Tallahassee, FL 32308

Total Value of Contract:

$94,545.00

Contract Dates:

The Contract was executed on February 15, 2011 with an effective date of February 21, 2011.

Due Dates and Contract Products:

Project Initiation - February 15, 2011

Student Housing Visioning Sessions - March 15, 2011

Lifestyle Market Viability Analysis - April 22, 2011

New Construction Analysis and Project Direction - May 9, 2011

Financial and Operational Review - May 27, 2011

Market and Financial Feasibility Review Report - June 13, 2011

TRD-201100626
Robert C. Moerke
Director of Contract Compliance
Texas State University-San Marcos
Filed: February 15, 2011

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The University of Texas System

Award of Consultant Contract Notification

The University of Texas Southwestern Medical Center at Dallas ("University"), in accordance with the provisions of the *Texas Government Code*, Chapter 2254, entered into a contract for consulting services ("Contract") with Grenzebach Giler and Associates, Inc. ("Consultant") as more particularly described in the Invitation for Consultants to Provide Offers of Consulting Services ("Invitation"), published in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9435).

Project Description:

In accordance with the Invitation and Consultant's response thereto, Consultant shall provide University with a comprehensive examination and evaluation of University's current institutional advancement information management system, with a primary focus on data management practices (gift processing and records management), and identifying core system competencies required to support current and long-term needs of University fundraising programs. Based upon the evaluation of information management requirements, Consultant shall also provide University with an analysis of the merits of proposed software systems that are in review for consideration by University.

Name and Address of Consultant:

Grenzebach Giler and Associates, Inc.

401 North Michigan Avenue, Suite 2800

Chicago, IL 60611

Total Value of Contract:

$68,116

Contract Dates:

The Contract was executed by Consultant on January 27, 2011, and by University on January 21, 2011, and dated effective on January 31, 2011.

Due Dates for Contract Products:

The consulting services will be completed and delivered to University no later than May 6, 2011.

The term of the Contract expires on May 6, 2011.

TRD-201100612
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: February 15, 2011

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Texas Water Development Board

Request for Statements of Qualifications for Water Research Study Priority Topics

The Texas Water Development Board (board) requests the submission of Statements of Qualifications from interested applicants leading to the possible award of contracts for state fiscal year 2011 to conduct water research on five priority topics. The total amount of the grants awarded by the board shall not exceed $500,000 from the Research and Planning Fund. Rules governing the Research and Planning Fund (31 Texas Administrative Code (TAC) Chapter 355) are available upon request from the board, or may be found at the Secretary of State's Internet address: http://www.sos.state.tx.us/tac/; then sequentially select, "TAC Viewer," "Title 31," "Part 10," "Chapter 355," and "Subchapter A." Guidelines for responding to this request for Statements of Qualifications, which include an application form and detailed information on the research topic, will be available at the board's website at: http://www.twdb.state.tx.us/publications/requestforproposals/requestforproposals_index.asp, or will be provided upon request.

Description of the Research Objectives and Purpose

Statements of Qualifications are requested for the following five priority research topics.

Unified costing tool for regional water planning (not to exceed $100,000)

Texas's regional water planning process requires development of cost estimates as a part of evaluating and recommending water management strategies. Although all project cost estimates must incorporate the basic elements required by TWDB rules and guidance, the underlying costing source data, methodology, and reporting of each of the 16 regions cost estimates nevertheless varies depending upon assumptions employed by the technical consultants preparing the estimates. This produces inconsistency in the costs that are aggregated in the state water plans and makes it difficult to extract and make comparisons of particular types of projects or cost elements from multiple regional water plans.

To ensure that project cost estimates, like estimates of project water yields, are consistent and comparable statewide, research is needed to develop a standard costing tool that will be used by regional water planning groups and their consultants to develop water management strategy cost estimates.

The purpose of the research is to develop a spreadsheet tool that will provide a common platform on which each region can assemble robust cost estimates for projects, including conservation, in a similar fashion while allowing for local information to be incorporated. The cost estimating tool will reduce the expense of developing and updating project cost estimates and improve the quality and usefulness of cost estimates in regional and state water plans.

The selected research team should:

1. Develop a set of source cost tables for facilities typically used in costing (such as pipe, pump stations) to include:

a. an underlying historical cost source database (for example, published costs; historical data) on which costs are constructed;

b. a flexible data structure that can be updated and customized based on local actual cost data;

c. a means to calibrate the costing curves against historical data.

2. Develop costing model spreadsheets that incorporate the cost tables and each water management strategy's unique attributes to calculate the costs of water management strategies including:

a. water development strategies (for example, reservoirs, pipelines, pump stations, well fields);

b. conservation strategies (to incorporate methodologies from previous TWDB-funded research);

c. drought management strategies (estimating the probable economic costs of demand management in a way that allows regional water planning groups to make reasonable comparisons to the alternative financial costs of developing water projects; to incorporate methodologies from previous TWDB-funded research).

3. Develop a tool to produce estimates of total capital costs, project costs, debt service, annual costs, and unit costs.

4. Develop a tool to facilitate apples-to-apples comparisons by providing discounted present value unit cost estimates of project water supply to normalize for variable project start dates and annual costs.

5. Ensure that the tool output provides a detailed breakdown of cost estimates that will allow modification of formats in accordance with TWDB guidelines.

6. Include cost elements including, but not limited to, land purchase broken down by major infrastructure component, surveying, infrastructure components, interest during construction, mitigation, environmental studies, and engineering and legal costs.

7. Provide a user's manual explaining how to use and update the tool calculators and data platform; the assumptions on which the tool is based; and suggested alternative cost estimating methods that may be considered when better local data is available.

8. Base all cost sources and methodologies on generally recognized industry standards and regional water planning rules and guidance and allow for updates to the tool in response to changes in rules and/or data.

Beneficiaries of the research would include:

1. regional water planning group members;

2. stakeholders;

3. Texas Water Development Board;

4. Texas Commission on Environmental Quality;

5. Texas Parks and Wildlife Department;

6. U.S. Army Corps of Engineers;

7. Texas Department of Agriculture;

8. cities and water utilities being planned for in the plans; and

9. technical consultants assisting regional water planning groups in preparing the planning documents.

Among the questions that the research will answer:

1. What are the best data sources and methodologies for developing cost estimates across the state?

2. What are the appropriate cost details and assumptions that should be used to calculate total project costs for each water management strategy?

3. Are there better ways to present water management strategy costs?

4. How flexible can the standard costing tool be while maintaining its integrity and usefulness?

Developing practical alternatives to pilot plant studies for innovative water technologies (not to exceed $150,000)

Brackish groundwater desalination is a key component of the water supply portfolio in Texas. Almost all desalination facilities and many water reuse facilities in Texas use reverse osmosis membrane processes for water treatment. One of the major limitations of reverse osmosis membrane processes is the accumulation of dissolved, colloidal, or biological materials on the membrane surface, which inhibits fresh water production through the membrane. The process is known as membrane fouling, which ultimately requires existing membranes to be replaced with new ones.

Most of the reverse osmosis membrane facilities replace their membranes once every 10 years. However, with the rapid improvement in membrane performance, new generation membranes are being developed every three to five years. Compared to older generation membranes, new generation membranes provide much better performance in terms of productivity and efficiency.

In accordance with 30 TAC §290.42(g), membrane filtration is considered as an innovative water technology; as such, in Texas, membrane filtration projects are required to conduct a full-scale pilot test of membrane processes to qualify new membranes for use in existing plants. Conducting a conventional pilot test is costly and time consuming. High costs of traditional pilot tests are a deterrent for small-scale facilities that are considering replacing older generation membranes with the recently developed membranes.

The study is designed to aid regional water planning groups, operators and designers of brackish groundwater desalination facilities. The desired study will focus on reverse osmosis membrane processes for brackish groundwater desalination and will include the following tasks:

1. Perform a literature search to identify and document the current state of technology and applicable legal issues related to conventional pilot testing of different types of membrane processes: micro-filtration, ultra-filtration, nano-filtration and reverse osmosis.

2. Develop and demonstrate cost-effective alternative approaches to conventional brackish groundwater reverse osmosis pilot testing for regulatory approval. Alternative approaches may include, for example, desktop models and modified pilot plant studies.

3. Coordinate with the Texas Commission on Environmental Quality to validate the effectiveness and acceptability of the recommended alternative approaches.

4. Develop a cost analysis of conventional and recommended alternative approaches.

5. Prepare a guidance document to implement recommended alternatives to conventional pilot test methods for brackish groundwater reverse-osmosis membrane desalination processes.

Evaluation of Natural Resources Conservation Service flood and sediment control structure conditions to better estimate erosion rates (not to exceed $75,000)

Between 1948 and 1998 the National Resources Conservation Service assisted local sponsors in constructing nearly 2,000 small floodwater retaining structures across Texas, primarily to provide flood protection upstream of major flood control reservoirs. Secondary benefits of these structures include sediment retention and in some cases water supply. Over time these structures have filled with sediment and lost their retention capacity. Over 450 structures are now over 50 years in age, and while some structures have nearly filled with sediment, others appear to be exceeding their design lives and have significant retention capacity remaining. The proposed research will evaluate the degree to which targeted National Resources Conservation Service structures have filled with sediment to determine or verify sediment erosion rates and sediment loads in their contributing watersheds. The study will be coordinated with TWDB and National Resources Conservation Service to help identify and compile historical data available for this purpose and to identify candidate structures that can be surveyed to provide additional information. A component of this study includes collection of new data at targeted structures and developing methods by which to efficiently obtain this information.

Prior to the mid 1980s, the National Resources Conservation Service conducted surveys on flood control structures in Texas to evaluate their conditions. Information describing the state of these structures up to that time may have been archived at universities and will need to be located and evaluated for its utility. Since the mid 1980s no regular surveys have been conducted on these structures and their current conditions are not well known or documented. The large number of structures in existence represents a large untapped source of information regarding erosion rates and sediment loads for watersheds in Texas. Comparing current sediment contents to design or as-built dimensions, if this information can be obtained, or to information obtained in past surveys would allow an estimate of erosion rates and sediment loads produced by different watersheds across the state. Although many of these structures were designed with a 50-year life with the assumption that their sediment pools would fill in that time, some of these structures still have ample capacity. This study will attempt to determine actual erosion rates and sediment loads, and secondarily to relate differences between these rates in different watersheds to significant parameters such as soil types, land use, rainfall rates, and other related parameters.

The selected research team will:

1. Coordinate with TWDB to identify watersheds, flood control structures, and reservoirs of primary interest for this study.

2. Coordinate with TWDB and National Resources Conservation Service to identify relevant data sets including past survey information, design or as-built structure dimensions, and existing estimates of erosion rates and sediment loads in Texas.

3. Develop methods to effectively and efficiently measure or estimate current sedimentation in flood control structures based on their current conditions. This may require further coordination with district State Soil and Water Conservation Board offices to ensure access to the structures of interest.

4. Coordinate with TWDB to identify which and how many structures to evaluate within budget constraints using the methods developed by the team.

5. Estimate erosion rates and sediment loads for watersheds upstream of targeted structures using methods developed in the previous steps.

6. Compare erosion rates and sediment loads developed in this study to other estimates, and where discrepancies exist, determine reasons for the differences.

Among the questions the selected team should answer are:

1. What are the erosion rates and sediment loads for selected watersheds based on the methods developed in this study?

2. Can sedimentation conditions in NRCS structure and the methods developed in this study be used to provide accurate sediment erosion rates in upstream watersheds and sediment loads for downstream reservoirs?

3. What are sediment loads to downstream reservoirs based on methods developed in this study?

4. How do these sediment loads compare to sedimentation conditions in Texas reservoirs based on hydrographic surveys?

5. Which reservoirs in Texas are at greatest risk for loss of storage capacity due to sedimentation?

Lifetime cost/benefit assessment of natural channel design versus traditional stormwater infrastructure (not to exceed $100,000)

Natural Channel Design techniques are currently being employed for a number of reasons: stream stability, functional uplift, and water quality being the most common. However, the conventional thinking is that the utilization of Natural Channel Design represents a trade-off or compromise from the most efficient channel design, as Natural Channel Design techniques might require more right-of-way or may involve a higher construction cost. However, experience suggests that this conventional thinking may not be correct; or at the very least the relative costs may be substantially overstated while the relative benefits may be understated. Based on this likely misunderstanding of the benefits and costs of Natural Channel Design, there is a great need for research to attempt to better quantify and understand the benefits and costs associated with natural channel design, especially when compared to traditional channelization techniques employed in stormwater infrastructure.

Over the years, the techniques employed to manage stormwater have evolved. At one point, the common thinking was that the most efficient way to manage stormwater was to drain it quickly and efficiently away from trouble areas. Over the years, this thinking has changed, as this approach mainly resulted in moving problems downstream. Consequently, the use of stormwater detention become more common to relieve streams of the pressures from upstream development and to reduce flood flows. But the urbanization of areas still often requires the manipulation of the natural stream.

This is caused by:

1. Changing upstream conditions result in changes to flows and bedloads, resulting in the erosion and incision of streams;

2. The need for outfall depth for developments, requiring the deepening of streams; and

3. Additional desires to reduce flooding.

In addition, many manmade or channelized streams have suffered significant aggradation and degradation, resulting in loss of function in areas of flood control, water quality, and ecological health.

The most "efficient" channel, one that is trapezoidal in shape, heavily maintained, and often armored, is often constructed to address drainage concerns. It is commonly accepted that such a channel results in a com-

promise to the natural environment and to water quality, but it is also commonly accepted that such a channel is better at addressing the "primary" function, which is flood control. It is generally accepted that Natural Channel Design channels better address full functional uplift and water quality, but at a compromise to cost and effectiveness. However, experience in certain regions suggests that Natural Channel Design techniques may perform better than generally understood in areas of flood control function and cost. This is based upon the following:

1. Natural Channel Design channels do not require heavy armoring, resulting in substantial savings in construction;

2. Natural Channel Design channels are, by definition, more stable and require much less regular maintenance;

3. Natural Channel Design channels should not require major repairs; and

4. Natural Channel Design channels provide functional lift that should be recognized as an economic benefit.

The primary benefit of the Natural Channel Design approach is that stream stability is provided in a way that maximizes ecological functions. For this reason, regulatory agencies across the country are increasingly advocating the Natural Channel Design approach to address stream stability issues, rather than more traditional hardening approaches (concrete, rip-rap) that are becoming increasingly difficult to permit. These regulations have made their way to Texas, and the U.S. Army Corps of Engineers Galveston and Fort Worth Districts are currently developing new guidelines for working within Texas streams. The proposed research would benefit any municipality, individual, or organization in the State of Texas who is charged with the use and protection of the state's water resources, such as regional water districts, water authorities, municipal water programs, regulatory agencies, and private landowners. These groups will need to evaluate new ways to handle stormwater and stream stability issues in the future that minimize the impact to the environment and stream ecosystems. One important aspect of their decision making will be the costs involved. Advocates for Natural Channel Design propose that the practices can achieve the same stormwater discharge requirements as traditional methods, but with improved water quality and ecosystem benefits, and lower costs. Lower costs are expected due to reduced long-term maintenance needs, and some Natural Channel Design approaches also have lower installation costs than more traditional methods.

The proposed research will seek to answer the following questions:

1. Are Natural Channel Design techniques appropriate for use in Texas? What adjustments and modifications are likely needed as compared to projects that have been completed on the east coast? These questions will be answered by analyzing data from Natural Channel Design projects completed in other regions and from observations and data collected from Texas streams and conveyances.

2. How does Natural Channel Design and traditional stormwater practices compare regarding ecological and water quality benefits? The primary focus of this research will be to evaluate the comparative economic costs of the two practices; however, in light of regulatory changes that are being enacted, it is important to compare the practices from an ecological and water quality standpoint as well.

3. What is the difference in costs between NCD and more traditional stormwater conveyance projects? NCD projects would include those that incorporate reconnecting the stream with its floodplain (either raising the stream or excavating a floodplain), restoration of channel pattern, and use of instream structures to provide stability and habitat, and vegetation for stability. Traditional stormwater conveyance projects would include excavated flood channels, pilot channels, and hard stabilization (rip-rap, concrete, gabions, etc.). Cost analyses would look at design, installation, and long-term maintenance costs of each practice and provide comparisons for different situations.

Establishing a subdivision-scale rainwater harvesting system (not to exceed $75,000)

Roof-based rainwater harvesting is one of a limited number of water supply options available in some rural areas of Central Texas that are running out of the more traditional supplies such as groundwater and surface water. While rainwater harvesting systems have become popular and commonplace at individual homes, few if any exist as part of an integrated system on a neighborhood or subdivision scale.

The integrated system envisioned here consists of individual buildings in a subdivision harvesting rainwater from their own roofs and routing this water to a cistern integrated into or associated with each building. In essence, each building will consist of a self-contained water supply system including all facilities required to filter, treat, and disinfect the water so that it can be used to supply all water demands within and around that building. However, all buildings would be connected to a subdivision-wide water system designed to provide a backup supply.

Subdivision-scale integrated systems offer several advantages including the opportunity to incorporate reliable and robust backup supply systems to meet shortages. However, there is not much information currently available on the design, costs, feasibility, and regulatory requirements for such large-scale systems and on the effect that such systems may have on the environment, particularly the hydrologic environment.

The proposed study will examine the feasibility of and requirements for implementing subdivision-scale rainwater harvesting systems in rural Central Texas that can provide a continuously-assured water supply to users in the subdivision. It will also examine the effects that these large-scale systems may have on the hydrologic environment.

The study will result in a roadmap that can provide guidance to communities and the public interested in pursuing subdivision-scale rainwater harvesting systems. If feasible, this water supply strategy may help relieve stress on aquifers that have been experiencing significant water level declines.

The desired study will include the following tasks:

1. Examine the feasibility of developing subdivision-scale, roof-based, rainwater harvesting systems in rural Central Texas;

2. Define the infrastructure requirements for the system (individual homes and the integrated system);

3. Assess backup water supply options for the system including costs, permitting requirements, and other relevant issues;

4. Examine the impact of the system on the local hydrologic environment;

5. Identify and assess permitting and other regulatory issues that may govern these large-scale systems; and

6. Conduct a cost analysis of implementing the subdivision-scale rainwater harvesting strategy including impacts to the marketability of homes that employ the strategy.

Deadline for Submittal, Review Criteria and Contact Person for Additional Information

Historically Underutilized Businesses (HUBs) are encouraged to submit Statements of Qualifications and/or participate as subcontractors in the water research program. As instructed at Texas Government Code §2161.252 and 34 TAC §20.14, if the anticipated cost of the study is to exceed $100,000, the applicant must complete a HUB Subcontracting

Plan according to: http://www.tbpc.state.tx.us/communities/procurement/prog/hub/hub-subcontracting-plan.

All applicants must obtain the board's guidelines for responding to the Statements of Qualifications.

The guidelines are available at http://www.twdb.state.tx.us/publications/requestforproposals/requestforproposals_index.asp.

Ten double-sided, double-spaced copies and one CD with a copy of the application in .pdf format of a completed Statement of Qualifications must be filed with the board prior to 12:00 p.m. on Monday, April 18, 2011. Respondents to this request shall limit their Statement of Qualifications to the size previously mentioned, excluding the resumes of the project team members.

Statements of Qualifications can be directed either in person to Mr. David Carter, Texas Water Development Board, Stephen F. Austin Building, Room 610D, 1700 North Congress Avenue, Austin, Texas; or by mail to Mr. David Carter, Texas Water Development Board, P.O. Box 13231 - Capitol Station, Austin, Texas 78711-3231.

TRD-201100617
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: February 15, 2011

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 36 (2011) is cited as follows: 36 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "36 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 36 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*